94753

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

## No. 663.

DAVID H. RIDDLE, APPELLANT,

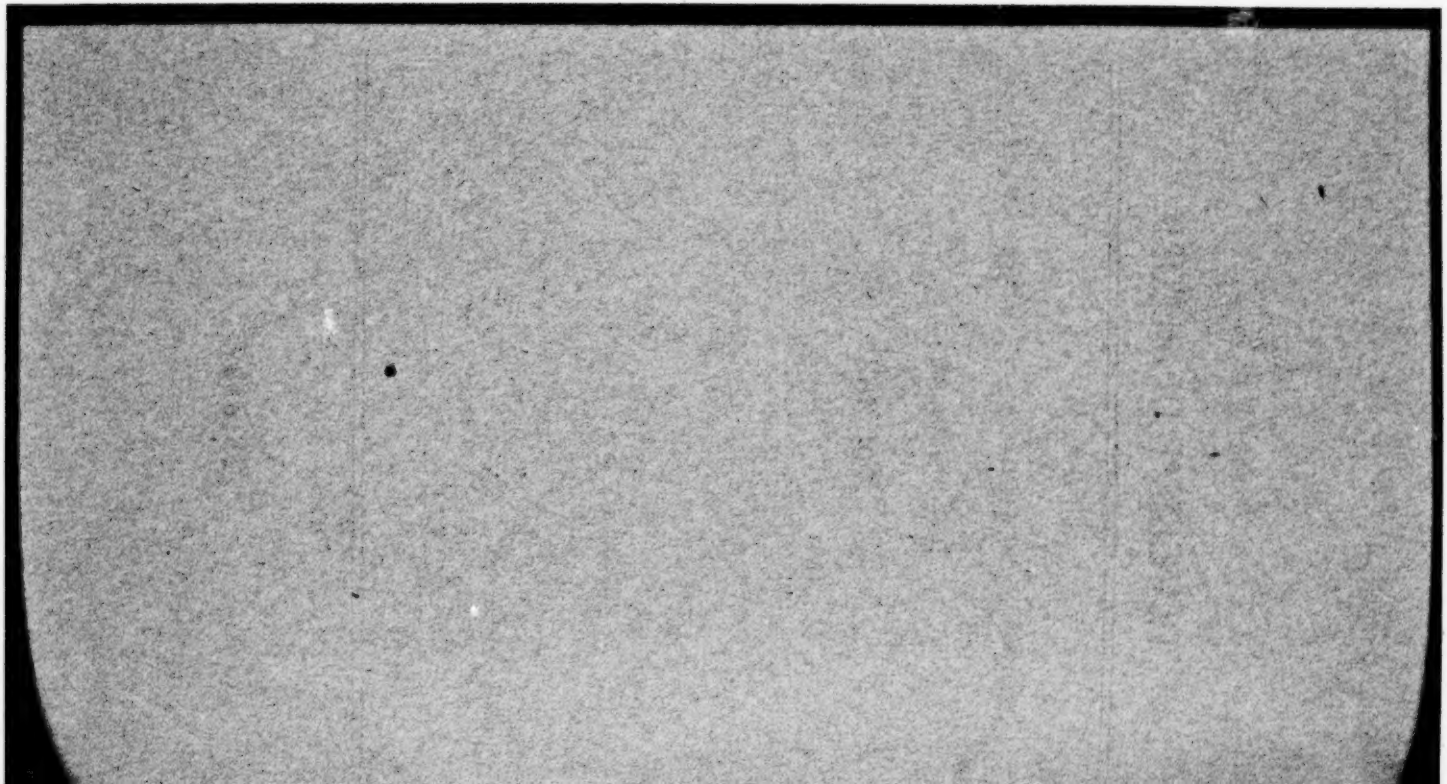
*vs.*

JAMES E. DYCHE, WARDEN OF THE UNITED STATES PENITENTIARY AT ATLANTA, GEORGIA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

FILED OCTOBER 26, 1932.

(29,213)



(29,213)

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1922.**

# No. 663.

DAVID H. RIDDLE, APPELLANT,

*vs.*

JAMES E. DYCHE, WARDEN OF THE UNITED STATES PENITENTIARY AT ATLANTA, GEORGIA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

INDEX.


| | Original. | Print. |
|---|---|---|
| Record from the U. S. district court for the northern district of Georgia | 1 | 1 |
| Petition for writ of *habeas corpus* | 1 | 1 |
| Order allowing writ | 6 | 5 |
| Writ of *habeas corpus* and marshal's return (copy) | 7 | 5 |
| Writ of *habeas corpus* and warden's return | 9 | 6 |
| Answer | 11 | 7 |
| Exhibit A—Warrant of commitment | 16 | 10 |
| Clerk's certificate | 17 | 11 |
| Judge's certificate to clerk | 18 | 11 |
| Clerk's certificate to judge | 18 | 12 |
| Exhibit B—Record from U. S. district court for the northern district of Alabama | 20 | 12 |
| Caption | 20 | 12 |
| Indictment | 20 | 13 |
| Minute entries | 38 | 26 |
| Verdict | 40 | 27 |
| Judgment | 40 | 27 |
| Minute entries | 43 | 29 |


JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 12, 1922.

| | Original. | Print. |
|---|---|---|
| Motion to strike Exhibit B and order striking certain portions thereof | 45 | 30 |
| Traverse | 47 | 31 |
| Order remanding petitioner to custody of warden, etc | 57 | 37 |
| Exceptions to order discharging writ | 58 | 38 |
| Certificate of trial judge | 61 | 41 |
| Petition for and order allowing appeal | 62 | 41 |
| Statement of evidence | 63 | 42 |
| Testimony of B. S. Dormon | 63 | 42 |
| L. H. Ellis | 65 | 44 |
| James F. Mathews | 72 | 49 |
| Jim C. Smith | 73 | 50 |
| Exhibit Assignment of Errors in U. S. District Court for the Northern District of Alabama | 77 | 53 |
| Exhibit Stipulation and Order Extending Time to File Bill of Exceptions in U. S. District Court for the Northern District of Alabama | 79 | 56 |
| Exhibit Acceptance by D. H. Riddle of Submission of Writ of Errir in C. C. A | 81 | 58 |
| Exhibit Order of D. C. U. S. for the Northern District of Alabama Denying Motion to Amend Judgment Entry | 82 | 58 |
| Exhibit Order of D. C. U. S for the Northern District of Alabama Denying Motion to Set Aside Judgment | 82 | 59 |
| Opinion, Sibley, J | 84 | 60 |
| Order settling statement of facts | 91 | 67 |
| Assignments of error | 92 | 67 |
| Bond on appeal | 96 | 70 |
| Præcipe for transcript | 98 | 72 |
| Citation and service | 101 | 74 |
| Clerk's certificate | 102 | 75 |

1 In the District Court of the United States for the Northern District of Georgia.

No. —.

DAVID H. RIDDLE, Petitioner,

vs.

JAMES E. DYCHE, Warden of the United States Penitentiary at Atlanta, Georgia, Respondent.

Habeas Corpus.

*Petition for Writ of Habeas Corpus and Order Directing Writ to Issue.*

To the Honorable Samuel H. Sibley, Judge of the said Court:

Petitioner states as follows:

1. He is a citizen of the United States, and a citizen and resident of the State of Alabama.

2. He is unlawfully imprisoned and restrained of his liberty by respondent, James E. Dyche, Warden of the United States Penitentiary at Atlanta, State of Georgia, and is now unlawfully detained by respondent, Warden as aforesaid, in his custody, at said place.

3. The sole cause or pretense of petitioner's said imprisonment, restraint and detention by respondent is as follows:

In the District Court of the United States for the Eastern Division of the Northern District of Alabama at the Fall Term, 1919, thereof, there was return against petitioner and others a certain indictment in seven counts, charging petitioner and said others with having prior to the returning of the said indictment violated sections 215 and 37 of the United States Federal Penal Code, the violation of each
2 of which Sections is under the laws of the United States and infamous offense as mentioned and referred to in and by the Constitution of the United States, and especially by Articles V and VI of the Amendments thereto: Thereafter, and on, to wit, the 16th day of August, 1920, the said indictment came on for trial in and by the said last-mentioned court, and upon the plea of not guilty to the said indictment by petitioner and the others aforesaid there were called and sworn as pretended jurors to try the same eleven persons, and no more, and throughout the said trial, so-called, there sat as the pretended jurors therein and thereat the said eleven persons, and no more, and to them and them only, as pretended jurors as aforesaid, the said indictment and the evidence produced at the said pretended trial were presented and submitted, and upon consideration of the same the said eleven persons, pretended jurors as aforesaid,

on, to-wit, the 20th day of August, 1920, reported to the said court that they, the said eleven persons, found petitioner and the said others, his co-defendants in the said indictment, guilty, thereon, that is to say, on the counts thereof, numbered respectively, two (2), four (4) and five (5). Thereupon and thereafter, upon such the report of the said eleven persons, pretended jurors as aforesaid, as though the same were the verdict of a good and lawful jury, the Judge of the said Court, namely, the Honorable William I. Grubb, passed and imposed against and upon petitioner a pretended judgment and sentence of imprisonment in the said United States Penitentiary at Atlanta, Georgia, for three successive terms, aggregating in all thirty-nine months, and of fines aggregating the sum of ten thousand two hundred dollars ($10,200); and it is in and by pretended compliance with and authority of the said pretended judgment and sentence, and such only, that respondent now unlawfully imprisons, restrains and detains petitioner as aforesaid.

4. The facts respecting the selection of the said eleven persons as pretended jurors as aforesaid at the said trial, the submission
3 of the said indictment and evidence to the same, and their report and pretended verdict as aforesaid, were and are as follows, and not any otherwise:

Upon the coming on for trial of the said indictment, and after the pleading not guilty thereto by petitioner and the said others, his co-defendants, it was undertaken to empanel a jury to try the same, but there being at the time and place present, qualified and conveniently available as jurors for the purpose only the eleven persons aforesaid, it was undertaken and assumed to be orally, and not otherwise, agreed and understood by and between Counsel respectively for the United States and for all the defendants in the said indictment and with the concurrence and consent of the latter, including petitioner, and of the judges presiding, the Honorable William I. Grubb aforesaid, that the said eleven persons might be sworn to try the said indictment and the defendants therein, including petitioner, as though they, the said eleven persons, might and would constitute a jury lawful to try the same; and the said eleven persons, and no more, were accordingly sworn and did in fact sit and act in and throughout the said trial as though in fact and in law they constituted and were a lawful jury in that behalf, and, as aforesaid, pretended and purported to render to the court their report that they, the said eleven persons, found petitioner and his said co-defendants guilty as aforesaid. And although it should, and according to the truth of the matter would, appear of record that the said indictment and the defendants therein had been tried by the said eleven persons only, the same does not appear, and is not, of record in the said court, and the fact is that the only pretended record of the said trial appearing contains the erroneous and false entry and recital following, namely: "To try this cause come a jury of good and lawful men duly empaneled, sworn and charged a true verdict to render according to the law and the evidence," notwithstanding that the assumed agreement and

COPY BOUND CLO

understanding aforesaid respecting the trial of the said indictment and the defendants therein was vain, futile and impotent to constitute the said eleven persons aforesaid a good and lawful jury to try the same; wherefore, the said entry and recital is not true, and is not a record; the very truth of the matter is that there never was a jury empaneled, sworn and charged in the said cause, the same never was tried by a jury, and no verdict was ever rendered therein; petitioner's plea of not guilty to the said indictment has, in fact and in law, never been tried, and the alleged judgment and sentence aforesaid of petitioner resting, and resting only, upon the report and pretended verdict of the eleven persons aforesaid, was and is wholly null, void and of none effect.

5. Petitioner is advised and accordingly alleges and avers as follows:

(1) The said eleven persons aforesaid did not constitute nor compose, and could not by any agreement, assent or consent by or on behalf of petitioner constitute or compose, a lawful jury, or a jury in fact, to try him, petitioner, upon the indictment aforesaid or any count or charge thereof;

(2) The said eleven persons and the Judge presiding aforesaid did not constitute, and could not by any agreement or consent as aforesaid constitute, a court or other lawful tribunal to try him, petitioner, as aforesaid.

(3) The pretended verdict aforesaid, being the reported finding of the said eleven persons as aforesaid was not, and is not, in either fact or law, the verdict of a jury according to the said Constitution and law of the land.

(4) The said pretended verdict was not, is not, and could not be, the basis or support of the pretended judgment and sentence aforesaid, or of any judgment or sentence, of him, petitioner, upon the said indictment or any count or charge thereof.

(5) Although if sitting with a jury lawfully constituted and composed the said court might or would have had jurisdiction to try him, petitioner, upon the said indictment, it was wholly without jurisdiction so to do when sitting with the said eleven persons aforesaid in manner aforesaid.

(6) Whatever jurisdiction the said court may have had when he, petitioner, was called for trial, upon the said indictment, the same ceased and was lost when the said court, in the course of the trial undertaken to be entered upon, and entered upon as aforesaid, assumed to try him, petitioner, with the said eleven persons as aforesaid in the place and stead of a lawful jury.

(7) When the said court assumed and undertook to try him, petitioner, with the said eleven persons as aforesaid, it became in law dissolved as a court, and thenceforth the proceedings against him, petitioner, in the premises were coram non judice.

OSE IN CENTER

(8) The pretended judgment and sentence aforesaid of him, petitioner, is wholly null, void and of none effect.

(9) The said judgment and sentence were, and are, in violation and disregard of his, petitioner's, rights, privileges and immunities under and by virtue of the provisions of the Constitution of the United States, and if enforced would deny him the same and deprive him thereof.

(10) Petitioner was not tried in the premises by a court and jury, or either, according to the Constitution and laws of the United States constituting courts and juries.

(11) Petitioner was not tried upon the said indictment or any count or charge thereof according to the provisions of the Constitution of the United States or the law of the land, but was undertaken to be tried, and tried, in defiance thereof and contrary thereto.

(12) By reason of the premises, the imprisonment, restraint and detention of him, petitioner, by respondent is contrary to law and the provisions aforesaid of the Constitution of the United States, and he is deprived of his liberty accordingly.

6. Petitioner is advised, and therefore avers and charges, that his said imprisonment, restraint and detention by respondent, Warden as aforesaid, being unlawful as aforesaid, he is entitled to be released and discharged therefrom; and, he accordingly prays that the writ of habeas corpus issue, directed to respondent, James E.
6 Dyche, Warden as aforesaid, or to such other person as may have petitioner in custody, commanding him to bring the body of petitioner before this court forthwith, to the end that his said imprisonment, restraint and detention may be duly inquired of; that pending consideration of this, his petition, petitioner may be admitted to bail in an amount to be fixed by the Court; and that upon final hearing hereof he may be released and discharged from such his imprisonment, restraint and detention aforesaid.

DAVID H. RIDDLE,
*Petitioner.*

HENRY E. DAVIS,
ALEXANDER & MEYERHARDT,
*Attorneys for Petitioner.*

STATE OF GEORGIA,
*County of Fulton, ss:*

Before me, a Notary Public in and for the State and County aforesaid, personally appeared David H. Riddle, who, being by me first duly sworn, deposes and says that he knows the contents of the foregoing petition by him subscribed, and that the statements therein made of his own knowledge are true and that those made on his information and belief he believes to be true.

DAVID H. RIDDLE.

COPY BOUND CL

Subscribed and sworn to before me this 7th day of July 1922.

DAVID J. MEYERHARDT,
*Notary Public, Ga., State at Large.*

*Order.*

Ordered that the writ of habeas Corpus issue returnable before me at Atlanta, Ga. at 10 a. m. July 8, 1922.

This July 7th, 1922.

SAM'L H. SIBLEY,
*U. S. Judge.*

Filed in Clerk's Office July 7th A. D. 1922.
O. C. FULLER,
*Clerk,*
By JON DEAN STEWARD,
*Deputy Clerk.*

7 In the District Court of the United States for the Northern District of Georgia, Northern Division, March Term, A. D. 1922.

The President of the United States of America to J. E. Dyche, Warden of the United States Penitentiary at Atlanta, in the State of Georgia, and to each and all of his deputies, Greeting:

We command you, That you have the body of David H. Riddle, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatever name he shall be called or charged, before the Honorable the District Court of the United States for the Northern District of Georgia, Northern Division, at a stated term thereof, to be holden on the eighth (8th) day of July, A. D. 1922, at ten o'clock in the forenoon of that day, in the United States District Court Room, in the United States and Court House and Post Office Building, in the City of Atlanta, Georgia, to do and receive what shall then and there be considered by said Court concerning the said David H. Riddle, and have you then and there this writ, with your return thereon.

Witness, the Honorable Samuel H. Sibley, Judge of the District Court of the United States for the Northern District of Georgia, this the 7th day of July, A. D. 1922, and in the 147th Year of the Independence of the United States of America,

[SEAL.]

O. C. FULLER,
*Clerk United States District Court,*
*Northern District of Georgia,*
By JON DEAN STEWARD,
(JON DEAN STEWARD.)
*Deputy Clerk.*

SE IN CENTER

8 I certify that on July 7, 1922, I executed the within Writ by serving a copy on J. E. Dyche, Warden, U. S. Penitentiary at Atlanta, Fulton County, Ga.

This July 7, 1922.

WALTER AKERMAN,
*U. S. Marshal,*
By H. D. BUSH,
*Deputy.*

U. S. District Court. Filed in Clerk's Office Jul. 20, 1922.
O. C. FULLER,
*Clerk.*

9 In the District Court of the United States, for the Northern District of Georgia, Northern Division, March Term A. D. 1922.

The President of the United States of America to J. E. Dyche, Warden of the United States Penitentiary at Atlanta, in the State of Georgia, and to each and all of his Deputies, Greeting:

We command you, That you have the body of David H. Riddle, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatever name he shall be called or charged, before the Honorable the District Court of the United States for the Northern District of Georgia, Northern Division, at a stated term thereof, to be holden on the eighth (8th) day of July, A. D. 1922, at ten o'clock in the forenoon of that day, in the United States District Court Room, in the United States and Court House and Post Office Building, in the city of Atlanta, Georgia, to do and receive what shall then and there be considered by said Court concerning the said David H. Riddle, and have you then and there this writ, with your return thereon.

Witness, the Honorable Samuel H. Sibley, Judge of the District Court of the United States for the Northern District of Georgia, this the 7th day of July, A. D. 1922, and in the 147th Year of the Independence of the United States of America,

[SEAL.]

O. C. FULLER,
*Clerk United States District Court,*
*Northern District of Georgia,*
By JON DEAN STEWARD,
(JON DEAN STEWARD,)
*Deputy Clerk.*

COPY BOUND CLOS

10 UNITED STATES OF AMERICA,
*Northern District of Georgia,*
*Northern Division:*

In obedience to the within Writ of Habeas Corpus, I certify that I have this day produced the body of David H. Riddle in open Court as commanded in said Writ.
This July 8th 1922.

J. E. DYCHE,
*Warden of U. S. Penitentiary at Atlanta, Ga.,*
By G. L. CRABB,
*Guard.*

Filed in Clerk's office July 8, 1922.
O. C. FULLER,
*Clerk.*
By J. D. STEWARD,
*Deputy.*

11 *Answer & Return of James E. Dyche, as Warden, etc.*

Comes James E. Dyche, Warden of the United States Penitentiary, at Atlanta, Georgia, and produces the body of the said David H. Riddle, pursuant to the mandate of this Honorable Court issued in this cause on the seventh day of July, 1922, and for answer to said writ of habeas corpus directed to him, says:

That he holds the said David H. Riddle and restrains him of his liberty under and by virtue of a warrant of commitment issued on the third day of July, 1922, by the District Court of the United States for the Eastern Division of the Northern District of Alabama, a certified copy of which said warrant of commitment is hereto attached and made a part of this answer and return the same as if said warrant of commitment, in its entirety, were herein set forth, and marked "Exhibit A".

Further answering, the respondent says, upon information and belief, ground of which information and belief is a certified copy of the transcript of record in the United States Circuit Court of Appeals for the Fifth Circuit, in the case of D. H. Riddle, et als, v. United States of America, that petitioner in this cause was accorded a right to trial by jury, as more particularly will appear by reference to page 104 of the certified copy of said aforesaid transcript of record, hereto attached as "Exhibit B" and made a part of this answer and return, on which said page of said record appears the following language:

"To try this cause come a jury of good and lawful men duly impanelled, sworn and charged a true verdict to render according to the law and the evidence."

For further answer and return, respondent, on information and belief, ground of which is a certified copy of the transcript of the record in the United States Circuit Court of Appeals for the Fifth

OSE IN CENTER

Circuit in the matter of D. H. Riddle, et als, v. United States of America, says that this petitioner has already litigated in the Circuit Court of Appeals for the Fifth Circuit the question of whether
12 or not he was lawfully tried in the manner prescribed by law, having assigned as error to that court the action of the lower court in denying a motion made by petitioner to correct or amend the record of the said lower court, as will more particularly appear by reference to page 817, assignment of error Number 114, of the certified copy of said record hereto attached and made a part hereof.

For further answer and return, respondent, on information and belief, ground of which is a certified copy of the record aforesaid, says that this petitioner has already litigated the question of whether or not he was lawfully tried in the manner prescribed by law, by having assigned as error to that court the action of the lower court in denying a motion made by petitioner to quash and set aside the judgment rendered by the lower court, as will more particularly appear by reference to page 816, assignment of error number 113, of the certified copy of the record aforesaid.

For further answer and return, respondent, upon information and belief, ground of which is the same as aforesaid, that he holds the petitioner and restrains him of his liberty under and by virtue of a judgment of the District Court of the United States for the Eastern Division of the Northern District of Alabama rendered heretofore, to-wit, on the 20th day of August, 1920, in a case in said court tried entitled United States of America vs. D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, and W. G. Hardy, as will more particularly appear by reference to pages 103 to 109, both inclusive, of the certified transcript of the record aforesaid, which is hereto attached and made a part of this answer and return.

For further answer and return, respondent, says, on information and belief, ground of which is the Opinion of the United States Circuit Court of Appeals for the Fifth Circuit in the case of Riddle, et al, vs. United States, as said opinion is recorded in advanced sheets, No. 2, of Volume 279 of the Federal Reporter, at page 216 thereof, that he holds the said David H. Riddle and restrains him of his liberty under and by virtue of the judgment of the said United
13 States Circuit Court of Appeals for the Fifth Circuit, which said judgment of said court affirmed the decision and judgment of the District Court of the United States for the Eastern Division of the Northern District of Alabama.

For further answer and return, respondent, on information and belief, says that he holds the said David H. Riddle and restrains him of his liberty under and by virtue of the decision of the Supreme Court of the United States rendered in the cause of David H. Riddle, vs. United States of America, on June 5, 1922, denying the petition of the said David H. Riddle for a writ of certiorari in said cause.

For further answer and return, respondent, on information and belief, says that the very questions which petitioner seeks by his

COPY BOUND CLOS

petition to raise in this habeas corpus proceeding have already been before the Supreme Court of the United States in the case of Ex Parte Riddle, 255 U. S. at page 450, and that the Supreme Court, in the opinion, in that case held that petitioner's remedy was by writ of error, and respondent says that the petitioner has in fact prosecuted a writ of error to the Circuit Court of the United States for the Fifth Circuit, and that said latter court has affirmed the decision and judgment of the trial court, and that the Supreme Court of the United States, in its decision and judgment rendered June 5, 1922, denying petitioner's application for a writ of certiorari, has in fact affirmed the decision and judgment of the trial court.

For further answer and return, respondent, on information and belief, says that this petitioner has already litigated in the Circuit Court of Appeals and the Supreme Court of the United States the question of whether or not he was lawfully tried in the manner prescribed by law, and respondent is informed that each of the said latter courts have rendered judgments to the effect that the petitioner had been and was in fact lawfully tried in the manner prescribed by law.

Respondent attaches to this answer and return the following exhibits and makes them a part of the answer and return the
14 same as if they were re-copied in this answer and return; a copy of the warrant of commitment, certified according to the Acts of Congress, which respondent marks as Exhibit A; a certified copy of the transcript of the record of the District Court of the United States for the Eastern Division of the Northern District of Alabama, which he marks Exhibit B.

Respondent further answers and says that he holds the said David H. Riddle and restrains him of his liberty under and by virtue of the following, which more particularly appears by reference to the exhibits hereto attached and the decisions of courts of record: (1) under and by virtue of the warrant of commitment, certified copy of which is hereto attached, marked Exhibit A; (2) under and by virtue of the judgment and order of the District Court of the United States for the Eastern Division of the Northern District of Alabama, which said judgment and order of said court was affirmed by the United States Circuit of Appeals for the Fifth Circuit on the 15th day of February, 1922, from which judgment and order of said latter court affirming the judgment and order of the said District Court, the petitioner's, the said David H. Riddle's application for a writ of certiorari, was denied by the Supreme Court of the United States on June 5, 1922, all of which said courts have held that the said David H. Riddle was lawfully tried by jury in the manner prescribed and provided by law.

That he produces herewith the body of the said David H. Riddle to abide any further orders or decree of this Honorable Court.

This the 7th day of July, A. D., 1922.

J. E. DYCHE,
*Warden of the United States*
*Penitentiary at Atlanta, Georgia.*



OSE IN CENTER

THE STATE OF GEORGIA,
*County of Fulton:*

Before me, a Notary Public in and for the State and County aforesaid, personally appeared James E. Dyche, who, being by me first duly sworn, deposes and says that he is the Warden of the United States Penitentiary, at Atlanta, Georgia; that he knows the
15 contents of the foregoing petition by him subscribed, and that the statements therein made of his own knowledge are true and that those made on his information and belief he believes to be true.

J. E. DYCHE,
*Warden of the United States Penitentiary Atlanta, Georgia.*

Subscribed and sworn to before me this the 7th day of July, 1922.
[SEAL.] HARRY MOSES,
*Notary Public, State of Georgia at Large.*

16 EXHIBIT A.

District Court of the United States for the Eastern Division of the Northern District of Alabama.

The President of the United States of America to the Marshal for the Northern District of Alabama, Greeting:

Whereas, D. H. Riddle was brought before the District Court of the United States for the Eastern Division of the Northern District of Alabama on this 20th day of August, 1920, on an Indictment charging him with having violated the Postal laws of the United States, and the said D. H. Riddle having, upon examination, been found guilty by the said Court and sentenced to imprisonment in the United States Penitentiary, Atlanta, Georgia, as follows:

Count 2: 13 months and a fine of One Hundred Dollars
Count 4: 13 months and a fine of One Hundred Dollars, to commence at the termination of the sentence of imprisonment and confinement under Count 2 of the indictment;
Count 5: 13 months and a fine of ten thousand dollars, said sentence of imprisonment and confinement under Count 5 to commence at the termination of the sentence of imprisonment and confinement imposed under count 4 of the indictment.
Sentence under Count 2 to begin July 6th, 1922.

Now, therefore, you are hereby commanded to receive the said D. H. Riddle into your custody and to commit him to said United States Penitentiary until the expiration of his said sentence, or until he is otherwise discharged by law, and make due return of how you have executed this writ.

COPY BOUND CLOS

Witness, the Hon. W. I. Grubb, Judge of the District Court of the United States, this 3rd day of July, 1922.

Issued the 3rd day of July, 1922.

[SEAL.] CHAS. J. ALLISON,
*Clerk District Court, Northern District of Alabama.*

Issued 3rd day of July, 1922.
CHAS. J. ALLISON,
*Clerk.*

17 UNITED STATES OF AMERICA,
*Northern District of Alabama:*

I, Charles J. Allison, Clerk of the District Court of the United States of America in and for said Division of said District, do hereby certify that the foregoing is a true, full, and complete copy of Final Commitment issued for D. H. Riddle, in the case of United States, vs. D. H. Riddle et als., in the Eastern Division of the Northern District of Alabama, as fully as the same does appear of record in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of said Court, at office in the city of Birmingham, in said District, this 3rd day of July, 1922.

[SEAL.] CHAS. J. ALLISON,
*Clerk of the U. S. District Court.*

18 *Certificate as to Official Character of Clerk by a Judge.*

THE UNITED STATES OF AMERICA,
*Northern District of Alabama,*
*Eastern Division:*

I, W. I. Grubb, Judge of the District Court of the United States, within and for the district aforesaid, the same being a court of record, within and for the district aforesaid; do hereby certify that Chas. J. Allison is Clerk of said Court, and was such clerk at the time of making and subscribing to the foregoing certificate, and that the attestation of said clerk is in due form of law, and by the proper officer.

In Testimony Whereof, I do hereby subscribe my name at Birmingham this 3rd day of July, 1922.

[SEAL.] W. I. GRUBB,
*Judge of the District Court of the United States for the Northern District of Alabama.*

OSE IN CENTER

*Certificate as to Official Character of Judge by the Clerk of the Court.*

THE UNITED STATES OF AMERICA,
*Northern District of Alabama,*
*Eastern Division:*

I, Chas. J. Allison, Clerk of the District Court of the United States, within and for the district aforesaid, do hereby certify that W. I. Grubb whose name is subscribed to the foregoing certificate, was, at the time of subscribing the same, Judge of the District Court of the United States, within and for the district aforesaid, duly commissioned and qualified, and that full faith and credit are due to all his official acts as such.

In Testimony Whereof, I have hereunto set my hand and
19 affixed the seal of said Court at Birmingham in said district and division this the 3rd day of July 1922.

[SEAL.] CHAS. J. ALLISON,
*Clerk United States District Court,*
*Northern District of Alabama.*

Filed in Clerk's Office 8 Day of July, 1922.

O. C. FULLER,
*Clerk,*
By J. C. BOONE,
*Dep. Ck.*

20 EXHIBIT "B."

THE UNITED STATES OF AMERICA,
*Northern District of Alabama:*

Pleas had at a regular term of the District Court of the United States in and for the Northern District of Alabama begun and held in the United States court rooms, in the city of Anniston, Alabama, in said district, on the first Monday of May, it being the 3rd day thereof, in the year of our Lord one thousand nine hundred and twenty, and of the Independence of the United States the one hundred and forty-fourth year.

Present: Honorable W. I. Grubb, United States District Judge Northern District of Alabama, presiding; Erle Pettus, United States Attorney; Ralph W. Quinn, Assistant United States Attorney; H. A. Skeggs, United States Marshal, and Chas. J. Allison, Clerk.

Monday, August 16, 1920.

The District Court of the United States, in and for the Northern District of Alabama, Eastern Division, met pursuant to adjournment. Present: Honorable W. I. Grubb, United States District Judge,

COPY BOUND CL

Northern District of Alabama, presiding; Erle Pettus, United States Attorney; Ralph W. Quinn, Assistant United States Attorney; H. A. Skeggs, United States Marshal, and Chas. J. Allison, Clerk.

*Indictment.*

Filed in Open Court, December 20, 1919. Chas. J. Allison, Clerk.

21 In the District Court of the United States for the Eastern Division of the Northern District of Alabama, Fall Term, 1919.

In the Matter of

THE UNITED STATES OF AMERICA

versus

D. H. RIDDLE, W. O. WOOTEN, W. A. SAVAGE, A. M. SAVAGE, T. A. ST. JOHN, W. G. HARDY, S. E. GRAHAM.

Count 1. Vio. Sec. 215, P. C.—The Grand Jurors of the United States elected, empanelled, sworn and charged to inquire for the body of the said Eastern Division of the Northern District of Alabama, upon their oaths present; That heretofore, to-wit, on or about the first day of March, A. D., 1918, at or near Talladega, in the County of Talladega, and State of Alabama, and within the jurisdiction of this court, D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy, and S. E. Graham, whose names are otherwise unknown to the grand jurors, having then and there devised and intending to devise a scheme and artifice to defraud various and sundry persons whose names and descriptions are to the Grand Jurors unknown, and for obtaining money by means of false and fraudulent pretenses, representations, and promises from said persons unknown, which said schems and artifice was in substance as follows, to-wit: That the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham, whose names are otherwise unknown to the Grand Jurors, would agree and arrange by and between themselves to sell and offer for sale to said persons unknown, and did then and there actually sell to said persons unknown, with like intent and purpose

22 on their part to defraud said persons unknown, large quantities of baled lint cotton, the quantity and further description of which being to the Grand Jurors unknown; and the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham, would fraudulently represent and pretend, and cause to be represented and pretended to said persons unknown that said cotton was of a superior grade and quality, to-wit, good middling, strict middling, good middling light tinges, strict middling to good middling, even running strict middling, one to one and one-sixteenth inch staple, which was in fact a higher grade and quality than said cotton actually was, and would

OSE IN CENTER

fraudulently represent and pretend and caused to be represented and pretended to said persons unknown that the weights of said cotton were greatly in excess of what they actually were, the exact weight as thus fraudulently represented and pretended being to the Grand Jurors unknown, and the actual weight of said cotton being to the Grand Jurors unknown; that at the time the said D. H. Riddle, W. O. Wooten, W. A. Savaga, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham would agree by and between themselves to sell and offer for sale, and at the time they did then and there offer for sale to said persons unknown said cotton, said representations and pretenses made and caused to be made by the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy, and S. E. Graham to said persons unknown as to the grade, quality and weights of said cotton were false, fraudulent and untrue, said cotton being of an inferior grade and quality and the same weighing far less than represented and pretended by the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham, and they the said D. H. Riddle, W. O. Wotten,
23 W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham well knew said representations and pretenses to be false and fradulent at the time they made the same and caused the same to be made, and the same were made as aforesaid with the intent and purpose on their part to defraud and for obtaining money from said persons unknown by means of said false and fraudulent pretenses and representations as aforesaid; and for the purpose of executing said scheme and artifice and attempting to do so, the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham, on or about to-wit: at various times from March 1, 1918, to April 1, 1918, did place and cause to be placed in the Postoffice of the United States at Talladega, in said Talladega County, Alabama, Division and District aforesaid, numerous letters, bills of lading and other mail matter, the number and further description of which being to the Grand Jurors unknown, addressed to said divers and sundry persons unknown, to be send and delivered by the post office establishment of the United States and which were in fact so sent and delivered to said persons unknown, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

Count 2. And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present; That at the time and place aforesaid, and within the jurisdiction aforesaid, the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham, whose names are otherwise unknown to the Grand Jurors, having then and there devised and intending to devise a scheme and artifice to defraud Buffalo Manufacturing Company at Shelby, North Carolina, a further description of which said company is to the Grand Jurors unknown, and for obtaining money from the said Buffalo Manufacturing Company by means of false
24 and fraudulent representations, pretenses, and promises, which said scheme and artifice was in substance as follows,

COPY BOUND CL

to-wit: That the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy, and S. E. Graham, whose names are otherwise unknown to the Grand Jurors would agree and arrange by and between themselves to sell and offer for sale, through and by the Savage Cotton Company, a corporation then doing business at Talladega, Albama, to the said Buffalo Manufacturing Company at Shelby, North Carolina, and did then and there actually sell to said Buffalo Manufacturing Company, with like intent and purpose on their part to defraud Buffalo Manufacturing Company, One Hundred (100) bales of lint cotton represented to be strict middling, one to one and one sixteenth inch staple, and represented to weigh Forty-Nine Thousand Five Hundred and Ninety-two (49,592) pounds; that the representations made and caused to be made by the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham as to the grade and weights of said cotton were false, fraudulent and untrue, and the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham, well knew that said representations and pretenses were false, fraudulent and untrue at the time they made the same; said cotton was of a far inferior grade and quality and the weights as represented were far in excess of the actual weights, grade and quality of said cotton, and this the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham well knew, and the said false and fraudulent pretenses and representations were made and caused to be made by the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham with the intent and purpose on their part to defraud the said Buffalo Manufacturing Company, and
25 for obtaining money from said company by means of said false and fraudulent pretenses and representations as aforesaid for the purpose of executing said scheme and artifice; and attempting to do so, the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham, did on or about the 18th day of March, A. D., 1918, place and caused to be placed in the postoffice of the United States at Talladega, in Talladega County, Alabama, Division and District aforesaid, a certain letter dated March 18th, 1918, 5:00 P. M., and addressed to H. T. Lampkin & Company, Charlotte, North Carolina, and purporting to be signed by Savage Cotton Company, per W. A. Savage, which said letter is in words and figures as follows:

LOSE IN CENTER

Codes:

Shepperson 78, 81, 15.
Myers, 39.

"Savage Cotton Company, Inc.

Cotton

Talladega, Alabama,

March 18, 1918—5.00 p. m.

H. T. Lampkin & Company,
Charlotte, N. C.

GENTLEMEN:

Enclosed herewith find our Invoice, Bill Lading, and detailed Weight Sheet on the 100 B/C shipped to Buffalo Mfg. Company, Stubbs, N. C.

Yours very truly,

SAVAGE COTTON COMPANY, INC.,
Per W. A. SAVAGE,
*Gen. Manager.*"

which said letter was to be sent and delivered by the postoffice establishment of the United States to the said H. T. Lampkin & Company, Charlotte, North Carolina, and which was in fact so sent and delivered, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

Count 3. And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present: That at the time and place aforesaid,
26 and within the jurisdiction aforesaid, the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham, whose names are otherwise unknown to the Grand Jurors, having then and there devised and intending to devise a certain scheme and artifice to defraud Roxboro Cotton Mills, at Roxboro, North Carolina, and for obtaining money from said Roxboro Cotton Mills by means of false and fraudulent pretenses, representations and promises, which said scheme and artifice is set out substantially in Count Two of this Indictment, to which reference is hereby made; for the purpose of executing said scheme and artifice and attempting to do so, the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham did on or about April 2d, 1918, place and cause to be placed in the post office of the United States at Talladega, Alabama, Division and District aforesaid, a certain letter purporting to be signed by Savage Cotton Company per W. A. Savage, and addressed to H. T. Lampkin and Company, Charlotte, North Carolina, which said letter is in words and figures as follows:

COPY BOUND CLOS

"Savage Cotton Company, Inc.

Cotton.

Talladega, Alabama, April 2d, 1918.

H. T. Lampkin & Company,
Charlotte, N. C.

GENTLEMEN:

Enclosed herewith find original Invoice and Detailed Weight Sheets on 100 B/C shipped to the Roxboro Cotton Mills, Roxboro, North Carolina.

Yours very truly,
SAVAGE COTTON COMPANY, INC.,
Per W. A. SAVAGE,
*General Manager.*"

27 which said letter was to be sent and delivered to said H. T. Lampkin & Company, at Charlotte, North Carolina, by the post office establishment of the United States, and which was in fact so sent and delivered, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

Count 4. And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present: That at the time and place aforesaid and within the jurisdiction aforesaid, the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham, whose names are otherwise unknown to the Grand Jurors, having then and there been devised and intending to devise a certain scheme and artifice to defraud the Entwistle Manufacturing Corporation, at Rockingham, North Carolina, a further description of which said company being to the Grand Jurors unknown, and for obtaining money from the Entwistle Manufacturing Corporation by means of false and fraudulent representations pretenses, and promises, which said scheme and artifice was in substance as follows, to-wit:

That the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham, whose names are otherwise unknown to the Grand Jurors, would agree and arrange by and between themselves to sell and offer for sale and cause to be sold and offered for sale through and by the Savage Cotton Company, a corporation then doing business at Talladega, Alabama, to said Entwistle Manufacturing Corporation, and did then and there actually sell and caused to be sold to said Entwistle Manufacturing Corporation, with like intent and purpose on their part to defraud the said Entwistle Manufacturing Corporation, One Hundred (100) bales of lint cotton, they, the said D. H. Riddle,



OSE IN CENTER

W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John,
28 W. G. Hardy and S. E. Graham, then and there falsely and fraudulently representing and causing to be represented and pretending the quality and grade of said cotton to be good middling, light tinges, 1 to 1 1/16 inch staple, and falsely and fraudulently representing and causing to be represented and pretending said cotton to weigh Forty-Nine Thousand Two Hundred and Thirty-Nine (49,239) pounds; that the false and fraudulent representations made and caused to be made as aforesaid as to the grade and weight of said cotton were false, fraudulent and untrue at the time they were made and caused to be made, and the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham well knew that the said representations and pretenses were false and fraudulent and untrue at the time they were made. The weights, grades and quality of said cotton as falsely and fraudulently represented and pretended as aforesaid were far superior and in excess of the actual weights, grade and quality of said cotton, and this the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham well knew, and the said false and fraudulent representations and pretenses were made and caused to be made as aforesaid with the intent and purpose on the part of the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham, at the time they were made and caused to be made, to defraud the said Entwistle Manufacturing Corporation and for obtaining money from said Entwistle Manufacturing Corporation by means of said false and fraudulent representations and pretenses as aforesaid; and for the purpose of executing said scheme and artifice and attempting to do so, the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham did on or about the 23d day of March, 1918, place and caused to be placed in the post office
29 of the United States at Talladega, Alabama, Division and District aforesaid, a certain letter dated March 23d, 1918, 4:05 P. M., and addressed to H. T. Lampkin & Company, at Charlotte, North Carolina, and purporting to be signed Savage Cotton Company, per W. A. Savage, General Manager, which said letter is in words and figures as follows:

COPY BOUND CL

Codes:

Shepperson 78, 81, 15.
Myers 39.

"Savage Cotton Company, Inc.

Cotton.

Talladega, Alabama,

March 23d, 1918—4.35 p. m.

H. T. Lampkin & Company,
Charlotte, N. C.

GENTLEMEN:

Enclosed herewith find copies of our invoices and Weight Sheets on the 100 B./C. shipped to Entwistle Mfg. Cor., Rockingham, N. C.

Yours very truly,

SAVAGE COTTON COMPANY, INC.,
Per W. A. SAVAGE,
*Gen. Manager.*"

W. A. S./S. Sc.

which said letter was to be sent and delivered to said H. T. Lampkin & Company, at Charlotte, North Carolina, by the post office establishment of the United States, and which was in fact so sent and delivered, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

Count 5. And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present: That at the time and place aforesaid, and within the jurisdiction aforesaid, the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham, whose names are otherwise unknown to the Grand Jurors, did then and there unlawfully and feloniously
30 conspire, combine, confederate and agree together to commit an offense against the United States in violation of Section 215 of the Penal Code in this: that the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham, whose names are otherwise unknown to the Grand Jurors, did then and there unlawfully and feloniously conspire, combine, confederate and agree together to defraud divers and sundry persons whose names and descriptions are to the Grand Jurors unknown, by devising a scheme and artifice to defraud said divers and sundry persons unknown and for obtaining money from them by means of false and fraudulent pretenses, representations and promises, which said scheme and artifice is set out in Count One of this indictment, to which reference is hereby made, and which said scheme and artifice was to be and was in fact effected and caused to be effected by the use of the mails, and for the pur-

OSE IN CENTER

pose of executing said scheme and artifice and attempting to do so the mails and post office establishment of the United States were to be and were in fact used and caused to be used by the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy, and S. E. Graham; and for the purpose of effecting the object of the said conspiracy, combination, confederation and agreement, one or more of the co-conspirators herein named, at the several times and places hereinafter mentioned did and cause to be done certain acts, that is to say:

(1) That the said W. A. Savage, A. M. Savage and W. O. Wooten on to-wit, the 19th day of March, 1918, drew and caused to be drawn a draft in the sum of Thirty-Two Thousand Seven Hundred Ninety & 88-100 ($32,790.88) Dollars on the Icemorlee Cotton Mills, Monroe, North Carolina, through the Merchants & Farmers Bank, which said draft is in words and figures, as follows:

31

Savage Cotton Company, Inc.,
Talladega, Alabama.

No. 46. Date 3-19-1918. $32,790.88.

3 Days Sight Days after Date Pay to the Order of Isbell National Bank, Talladega, Ala., A/C—100 B/C 49,610#—100 B/C 49,752# Thirty-two Thousand Seven Hundred Ninety and 88-100 Dollars.
Value received and charge same to account of

SAVAGE COTTON COMPANY, INC.,
By W. M. GEORGE,
*Cashier.*

To Icemorlee Mills, Monroe, N. C., Through Merchants & Farmers Bank.

(2) The said W. A. Savage on to-wit April 1st, 1918, mailed and caused to be mailed in the post office at Talladega, in Talladega County, Alabama, in said Division and District, a certain letter, dated April 30th, 1918, 6.30 P. M., and addressed to H. T. Lampkin & Company, Charlotte, North Carolina, and purporting to be signed by Savage Cotton Company, per W. A. Savage, General Manager, which said letter is in words and figures as follows:

COPY BOUND CL

Codes:

Shepperson 78, 81, 15.
Myers 39.

"Savage Cotton Company, Inc.

Cotton.

Talladega, Alabama,
April 1st, 1918—6.30 p. m.

H. T. Lamkin & Company,
Charlotte, N. C.

GENTLEMEN:

We are enclosing herewith our Detailed Weight Sheets and Invoices on 100 B/C shipped to Monroe, N. C., and also 200
32 B/C shipped to Greensboro, N. C.

Yours very truly,
SAVAGE COTTON COMPANY, INC.,
Per W. A. SAVAGE,
*Gen. Manager.*"

Mr. W. A. Savage.
SCC.

(3) The said W. A. Savage on to-wit, March 7th, 1918, mailed and caused to be mailed in the post office at Talladega, Alabama, in Talladega County, Division and District aforesaid, a certain letter addressed to J. I. Westervelt & Company, Greenville, South Carolina, purporting to be signed by Savage Cotton Company Per W. A. Savage, Manager, which said letter is in words and figures as follows:

Codes:

Shepperson 78, 81, 15.
Myers 39.

"Savage Cotton Company, Inc.

Cotton.

Talladega, Alabama,
March 7th, 1918—3.30 p. m.

J. I. Westervelt & Company,
Greenville, S. C.

GENTLEMEN:

Enclosed herewith find copies of our Bill Lading, Invoice and Weight Sheet on the 100 bales of cotton shipped to Woodside Cotton Mills, Greenville, South Carolina.

Yours very truly,
SAVAGE COTTON COMPANY, INC.,
Per W. A. SAVAGE,
*Gen. Manager.*"

Mr. W. A. Savage.
SCC.

SE IN CENTER

(4) That the said W. A. Savage, on to-wit, March 19th, 1918, drew and caused to be drawn a draft in the sum of Thirty-Three Thousand Five Hundred Three and 94-100 ($33,503.94) Dollars on the Icemorlee Cotton Mills, Monroe, North Carolina, through
33 the Farmers & Merchants Bank, which said draft is in words and figures as follows:

Savage Cotton Company, Inc.

No 47. Date 3-19-1918. $33,503.94.

3 Days Sight Days after Sight Pay to the Order of Bank & Trust Company, Talladega, Ala., A/C—100 B/C—49,831#—100 B/C 48,710# Thirty-three Thousand Five Hundred Three and 94-100 Dollars.

Value received and charge same to account of

SAVAGE COTTON COMPANY, INC.,
By W. M. GEORGE,
*Cashier.*

To Icemorlee Mills, Monroe, N. C., through Farmers & Merchants Bank.

(5) The said W. A. Savage on to-wit March 19th, 1918, mailed and caused to be mailed in the post office at Talladega, Alabama, in Talladega County, Division and District aforesaid, a certain letter addressed to Icemorlee Cotton Mills, Monroe, North Carolina, purporting to be signed Savage Cotton Company per W. A. Savage, General Manager, which said letter is in words and figures as follows:

Codes:

Shepperson 78, 81, 15.
Meyers 39.

"Savage Cotton Company, Inc.

Cotton.

Talladega, Alabama,

March 19th, 1918—5 p. m.

Icemorlee Cotton Mills,
Monroe, North Carolina.

GENTLEMEN:

Enclosed herewith find our Invoices, Detailed Weight Sheets and Bills Lading on 100 B/C marked FMBC, and 100 B/C marked

COPY BOUND CLO

ICMT, 100 B/C marked PANT, and 100 B/C marked RMFX, all of which are shipped to you at Monroe, North Carolina.

34 Yours very truly,

SAVAGE COTTON COMPANY, INC.,
Per W. A. SAVAGE,
*Gen. Manager.*"

Mr. W. A. Savage.

SCC.

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

Count 6. And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present: That at the time and place aforesaid, and within the jurisdiction aforesaid, the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham, whose names are otherwise unknown to the Grand Jurors, did then and there unlawfully and feloniously conspire, combine, confederate and agree together to commit an offense against the United States in violation of Section 215 of the Penal Code in this: The said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham, whose names are otherwise unknown to the Grand Jurors, did then and there unlawfully and feloniously conspire, combine, confederate and agree together to defraud the Buffalo Manufacturing Company, a business concern, a further description of which is to the Grand Jurors unknown, located at Shelby, North Carolina, by devising a scheme and artifice to defraud said Buffalo Manufacturing Company, and for obtaining money from said company by means of false and fraudulent pretenses, representations and promises, which said scheme and artifice is set out in Count Two of this Indictment, to which reference is hereby made, and which said scheme and artifice was to be effected, and which was in fact effected and caused to be effected by the use of the mails, and for the purpose of executing said scheme and artifice and attempting to do so the mails and post office establishment of the United States were to be used, and were in fact used and caused to be used, by the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham; and for the purpose of effecting the object of said conspiracy, combination, confederation and agreement, the said W. A. Savage, one of the defendants herein and co-conspirator, did and caused to be done a certain act, that is to say,

35

That the said W. A. Savage wrote and caused to be written, and mailed and caused to be mailed on to-wit, the 18th day of March, A. D., 1918, and did on the said 18th day of March, A. D., 1918, mail and caused to be mailed in the post office at Talladega, in Talladega County, Alabama, in said division and district, a certain letter, dated March 18th, 1918, 5 P. M., and addressed to H. T. Lampkin & Company, Charlotte, North Carolina, and purporting to be signed by Savage Cotton Company per W. A. Savage, General Manager, which said letter is in words and figures as follows:

E IN CENTER

Codes:

Shepperson 78, 81, 15.
Myers 39.

"Savage Cotton Company, Inc.

Cotton.

Talladega, Alabama,

March 18, 1918—5.00 p. m.

H. T. Lamkin & Company,
Charlotte, N. C.

GENTLEMEN:

Enclosed herewith find our Invoice, Bill Lading, and Detailed weight Sheet on the 100 B/C shipped to Buffalo Mfg. Company, Stubbs, N. C.

Yours very truly,

SAVAGE COTTON COMPANY, INC.,
Per W. A. SAVAGE,
*Gen. Manager.*"

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

36 Count 7. And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present: That at the time and place aforesaid, and within the jurisdiction aforesaid, the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy and S. E. Graham, whose names are otherwise unknown to the Grand Jurors, did then and there unlawfully and feloniously conspire, combine, confederate and agree together*gether* to commit an offense against the United States in violation of Section 215 of the Penal Code, in this: The said D. H. Riddle, W. O. Wooten, W. A. Savage, M. A. Savage, T. A. St. John, W. G. Hardy and S. E. Graham, whose names are otherwise unknown to the Grand Jurors, did then and there unlawfully and feloniously conspire, combine, confederate and agree together to defraud the Entwistle Manufacturing Corporation, a business concern, a further description of which is to the Grand Jurors unknown, located at Rockingham, North Carolina, by devising a scheme and artifice to defraud said Entwistle Manufacturing Corporation, and for obtaining money from said company by means of false and fraudulent pretenses, representation and promises, which said scheme and artifice is set out in Count Four of this indictment, to which reference is hereby made, and which said scheme and artifice was to be effected, and which was in fact effected and caused to be effected, by the use of the mails, and for the purpose of executing said scheme and artifice and attempting to do so the mails and post office establishment of the United States were to be used, and were in fact used and caused to be used

COPY BOUND CLO

by the said D. H. Riddle, W. O. Wooten, W. A. Savage, A. M. Savage, T. A. St. John, W. G. Hardy, and S. E. Graham; and for the purpose of effecting the object of said conspiracy, combination, confederation and agreement, the said W. A. Savage, one of the defendants herein and co-conspirators, did and caused
37 to be done a certain act, that is to say,

That the said W. A. Savage wrote and caused to be written and mailed and caused to be mailed on the 23rd day of March, A. D. 1918, and did on the said 23rd day of March, A. D. 1918, mail and cause- to be mailed in the post office at Talladega, in Talladega County, Alabama, in said division and district, a certain letter, dated March 23rd. 1918, 5:05 P. M., and addressed to H. T. Lamkin & Company, Charlotte, North Carolina, and purporting to be signed by Savage Cotton Company per W. A. Savage, General Manage, which said letter is in words and figures as follows:

Codes:

Shepperson 78, 81, 15.
Myers 39.

"Savage Cotton Company, Inc.

Cotton.

Talladega, Ala.,

March 23rd, 1918—5 p. m.
4.05 p. m.

H. T. Lamkin & Company,
Charlotte, N. C.

GENTLEMEN:

Enclosed herewith find copies of our invoice and Weight Sheets on the 100 B/C shipped to Entwistle Mfg. Cor., Rockingham, N. C.

Yours very truly,

SAVAGE COTTON COMPANY, INC.,
Per W. A. SAVAGE,
*Gen. Manager.*"

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

EARLE PETTUS,
*United States Attorney.*

A True Bill:

GEORGE E. BARLOW,
*Foreman of the Grand Jury.*



OSE IN CENTER

38 August 16th, 1920.

No. 744.

UNITED STATES OF AMERICA

vs.

D. H. RIDDLE, A. M. SAVAGE, W. O. WOOTEN, T. A. ST. JOHN, W. A. SAVAGE, W. G. HARDY, S. E. GRAHAM.

This cause coming on to be heard this day, come the parties hereto the United States of America, by United States Attorney, Erle Pettus, cometh also each of the defendants herein in his own proper person, and by counsel, and defendants submit demurrers to the Indictment filed herein against them, and each of them, charging an alleged violation of Sections 37 and 215 of the Penal Code of the United States. After understanding said demurrers, it is ordered by the court that said demurrers be sustained as to Counts One and Three of the indictment, and that said demurrers be overruled as to Counts Two, Four, Five, Six and Seven of the Indictment. Thereupon, defendants submit a motion for severance as to each defendant and, after understanding said motion, it is ordered by the court that the same be and hereby is overruled and denied, to which ruling of the court each defendant excepts separately and severally.

Thereupon, the defendants and each of them being arraigned in open court upon the Indictment filed herein against them, they and each of them plead not guilty thereto and, for defense, throw themselves upon their country, as doth also the United States Attorney.

To try this cause come a jury of good and lawful men duly impanelled, sworn and charged a true verdict to render according to the law and the evidence.

During the introduction of the evidence, the hour of daily adjournment having arrived, it is ordered by the court that this
39 cause be and same hereby is continued for further hearing until nine o'clock A. M. tomorrow morning, August 17th, 1920.

August 17, 1920.

Order daily continuance.

August 18th, 1920.

Order daily continuance.

August 19th, 1920.

This being the day and the hour to which this cause was on yesterday continued for further hearing, come again the parties hereto, the United States of America, by United States Attorney, Erle Pettus, cometh also each of the defendants in his own proper person and by counsel, cometh also the jury heretofore selected, impanelled, sworn and charged to try this cause, and the further hearing of this cause is resumed and begun.

After the introduction of all of the evidence in the case, the argument of counsel on behalf of the United States of America and on behalf of each of the defendants, separately and severally, and the oral charge delivered by the Court, the jury retire in charge of an officer of this court to consider of their verdict.

Thereupon, the hour of daily adjournment having arrived and the jury having this cause under consideration not having as yet agreed upon a verdict, it is ordered, adjudged and decreed by the Court that this cause be and same hereby is continued until 8:30 A. M. August 20th, 1920, for the purpose of receiving the verdict of the jury in said cause in the event the jury shall by that time have reached and agreed upon a verdict in this cause.

August 20th, 1920.

This being the day and the hour to which this cause was on yesterday continued for the report of the jury, cometh again the parties hereto, the United States of America, by United States Attorney, cometh also each of the defendants in his own proper person and by counsel, cometh also the jury heretofore selected, impanelled, sworn and charged to try this cause.

Thereupon the jury being inquired of by the Court as to whether or not they have been able to reach a verdict, and the jury making known to the court that they have reached, and agreed upon, their verdict, the jury return in open court the following verdict, which is read in open court by the Clerk of this Court and in the presence of each of the defendants, to wit:

"We the jury, find the defendants, W. A. Savage, A. M. Savage, W. O. Wooten, D. H. Riddle, T. A. St. John, S. E. Graham and W. G. Hardy guilty as charged under Counts 2, 4 and 5 of the indictment.

J. W. McCLURKIN,
*Foreman.*"

Thereupon, motion is made by the defendants that the jury be polled, which said motion is granted by the Court and each member of the jury is asked by the Clerk of this Court to state whether or not the above verdict is his verdict, and each member of the jury states that the above verdict is his verdict, which said poll of the jury is taken in open court and in the presence of each of the defendants and their counsel.

Thereupon, the defendants and each of them being separately and severally inquired of by the Court and showing no good or sufficient cause why sentence should not now be pronounced upon him, it is

Ordered, adjudged and decreed by the Court that the defendant, W. A. Savage, be and he hereby is sentenced to be imprisoned and confined in the United States Penitentiary at Atlanta, Georgia, for and during a period of thirteen months and to pay a fine of One Hundred Dollars on Count Two of the Indictment, and is further sentenced to be imprisoned and confined in the United States Peni-

tentiary, at Atlanta, Georgia, for and during a period of
41 thirteen months and to pay a fine of One Hundred Dollars on Count Four of the Indictment, said sentence of imprisonment and confinement under Count Four of the Indictment to commence at the termination of the sentence of imprisonment and confinement imposed upon the defendant, W. A. Savage, under Count Two of the Indictment, and it is further ordered, adjudged and decreed by the court that the defendant, W. A. Savage, be further sentenced, and he hereby is further sentenced, to be imprisoned and confined in the United States Penitentiary, at Atlanta, Georgia, for and during a period of thirteen months and to pay a fine of One Thousand Dollars under Count Five of the Indictment, said sentence of imprisonment and confinement under Count Five of the Indictment to commence at the termination of the sentence of imprisonment and confinement imposed upon the defendant under Count Four of the Indictment; and thereupon it is further

Ordered, adjudged and decreed by the Court that the defendant, D. H. Riddle, be and he hereby is sentenced to be imprisoned and confined in the United States Penitentiary, at Atlanta, Georgia, for and during a period of thirteen months and to pay a fine of One Hundred Dollars on Count Two of the Indictment, and it is further ordered, adjudged and decreed by the Court that the defendant, D. H. Riddle be and he hereby is further sentenced to be imprisoned and confined in the United States Penitentiary, at Atlanta, Georgia, for and during a period of thirteen months and to pay a fine of One Hundred Dollars on Count Four of the Indictment, said sentence of imprisonment and confinement under Count Four of the Indictment to commence at the termination of the sentence of imprisonment and confinement under Count Two of the Indictment, and it is further ordered, adjudged and decreed by the Court that the defendant, D. H. Riddle, be and he hereby is further sentenced to
be imprisoned and confined in the United States Peniten-
42 tiary, at Atlanta, Georgia, for and during a period of thirteen months and to pay a fine of Ten Thousand Dollars on Count Five of the Indictment, said sentence of imprisonment and confinement under Count Five of the Indictment to commence at the termination of the sentence of imprisonment and confinement imposed under Count Four of the Indictment; and thereupon, it is further

Ordered, adjudged and decreed by the Court that the defendant, W. O. Wooten, be and he hereby is sentenced to be imprisoned and confined in the United States Penitentiary, at Atlanta, Georgia, for and during a period of Thirteen Months and to pay a fine of One Hundred Dollars on Count Two of the Indictment, and it is further ordered, adjudged and decreed by the Court that the defendant, W. O. Wooten, be and he hereby is further sentenced to be imprisoned and confined in the United States Penitentiary, at Atlanta, Georgia, for and during a period of Thirteen Months and to pay a fine of One Hundred Dollars on Count Four of the Indictment, said sentence of imprisonment and confinement under Count Four of the Indictment to commence at the termination of the sentence

of imprisonment and confinement imposed under Count Two of the Indictment, and it is further ordered, adjudged and decreed by the Court that the defendant, W. O. Wooten, be and he hereby is further sentenced to be imprisoned and confined in the United States Penitentiary, at Atlanta, Georgia, for and during a period of thirteen months and to pay a fine of One Thousand Dollars on Count Five of the Indictment, said sentence of imprisonment and confinement under Count Five of the Indictment to commence at the termination of the sentence of imprisonment and confinement imposed under Count Four of the Indictment; and thereupon, it is further

Ordered, adjudged and decreed by the Court that the de-
43 fendant, W. G. Hardy, be and he hereby is sentenced to be imprisoned and confined in the United States Penitentiary, at Atlanta, Georgia, for and during a period of Eighteen months, and to pay a fine of One Thousand Dollars; and thereupon, it is further

Ordered, adjudged and decreed by the Court that the defendant, T. A. St. John, be and he hereby is sentenced to be imprisoned and confined in the United States Penitentiary, at Atlanta, Georgia, for and during a period of thirteen months, and to pay a fine of One Thousand Dollars; and thereupon, it is further

Ordered, adjudged and decreed by the Court that the defendant, S. E. Graham, be and he hereby is sentenced to be imprisoned and confined in the United States Penitentiary, at Atlanta, Georgia, for and during a period of thirteen months and to pay a fine of One Thousand Dollars.

The jurors who had been summoned in this case to try the issues involved in the case, being sworn as to their qualifications, and the Court having made certain inquiries of said jurors or prospective jurors as to the qualifications and interest in this, the attorney for D. H. Riddle, for and on behalf of said D. H. Riddle and defendants Graham, Wooten and St. John, made the following statement to the presiding Judge:

"We desire to request that the jury be qualified as to whether or not they are interested in or connected with the Atlanta, Birmingham & Atlantic Railway or the Alabama Power Company, and we offer to show that they are interested in this case at this time."

The Court: As grounds for striking for cause, I will not put the question, but I will let you ask it yourself.

44 The defendants and each of the defendants, separately and severally then excepted to the ruling of the Court that said question would not be put by the Court as a ground for challenge for cause. The attorney for D. H. Riddle again filed on behalf of the defendant separately and severally renewed the request of the Court that the jurors be asked if they were interested in the Alabama Power Company or the Atlanta, Birmingham & Atlanta Railway Company, and one of the jurors or prospective jurors stated that he was working for the Alabama Power Company at the time, and de-

fendant's counsel then asked that he be excused, and the Court overruled the motion, to which the defendant separately and severally excepted. Defendants thereupon exercised one of their challenges by challenging said juror. Defendants did not exhaust all their challenges. The attorney for the defendant, separately and severally then asked that the jurors be qualified as to their relationship to Mr. Keys and Mr. Detley, and the Court over-ruled the motion, and the defendants separately and severally excepted and offered to show the Court that Mr. Keys and Mr. Detley were interested in the results of the case. The Court then stated as follows: "If any of you are related to Mr. Keys or Mr. Detley, be seated." None of the jurors were related to Detley or Keys.

Thereupon after a statement of the case had been made by the attorney for the United States Government and attorneys for the defendant, the Government proceeded to put on and did put on the following evidence.

45 *Motion to Strike Exhibit and Order Striking Certain Portions Thereof.*

And now upon the coming in of the return, the petitioner respectfully moves the Court to strike therefrom and to remove from the files as any part of the pleadings the exhibit attached to said return, purporting to be a transcript of the record in the original cause as the same was carried by writ of error to the Circuit Court of Appeals, and for cause shows that no valuable purpose whatever is or can be served by attaching said exhibit and that the cost of recording the same or of copying the same on any other occasion, should such copying be necessary, will amount to not less than twenty-five hundred dollars for each copy made, and that to permit such exhibit to remain as a part of the pleadings amounts in substance to a denial of justice.

HENRY E. DAVIS,
ALEXANDER & MEYERHARDT,
*Attorneys for Petitioner.*

Filed July 10, A. D. 1922.

O. C. FULLER,
*Clerk,*
By J. D. STEWARD,
*Deputy.*

46 *Order Striking Parts of Exhibit ("B").*

Upon consideration of the within motion it is ordered that all of said exhibit be stricken and constitute no part of the pleadings, except the matter contained on pages 1 to 21 inclusive, pages 103, 104 and 105 and pages 106 to 109 inclusive and pages 115 and 116.

This order is to be construed as relating to the pleadings only, and is without prejudice to the right of either party to offer the whole or any part thereof in evidence.

This July 10, 1922.

SAM'L H. SIBLEY,
*U. S. Judge.*

47 *Traverse.*

Comes now petitioner in the above entitled matter and for reply to the return of the respondent therein states as follows:

(1) He believes the certified copy of the warrant of commitment mentioned in and attached to said return to be a true copy of the said warrant, and he avers that said warrant of commitment was issued and rests only upon the pretended judgment and sentence of petitioner, as in his petition set forth and described.

(2) He denies that he was accorded a right to trial by jury, as in and by the said return alleged or intended so to be, and he denies that the pretended record of the empanelling of a jury of good and lawful men to try him, to-wit, "To try this cause come a jury of good and lawful men, duly empanelled, sworn and charged a true verdict to render according to the law and evidence," is a true record, as in said return alleged or intended so to be, and to the contrary thereof he avers that the said recital is, as in and by his petition set forth and alleged, erroneous and false, as is hereinafter more particularly set forth and shown.

(3) He denies that, as in said return alleged or intended so to be, he has already litigated in the Circuit Court of Appeals for the Fifth Circuit the question of whether or not he was lawfully tried in the manner prescribed by law by reason of having assigned as error to that court the action of the lower court in denying a motion made by him to correct or amend the record of the said lower court, and respecting this his denial he refers to what is more particularly in that behalf hereinafter set forth and shown.

48 (4) He denies that, as in the said return alleged or intended so to be, he has already litigated the question whether or not he was lawfully tried in the manner prescribed by law by having assigned as error to the said Circuit Court of Appeals the action of the lower court in denying a motion made by him to quash and set aside the judgment rendered by the lower court, and respecting this his denial he refers to what is more particularly in that behalf hereinafter set forth and shown.

(5) He admits that he is held and restrained of his liberty by respondent, under and by virtue of the pretended judgment of the District Court of The United States for the Eastern Division of the Northern District of Alabama, purporting and pretended to have been rendered on the 20th day of August, 1920, as in the said return set forth and alleged, and he avers the fact to be that the said pre-

tended judgment is the same as that in his petition set forth and described, and that the reasons in said petition stated the same was and is wholly null and void and accordingly no authority nor justification in law for his detention and the restraint of his liberty by respondent as aforesaid.

(6) As respects the several allegations of said return that respondent holds him, petitioner, and restrains him of his liberty (1), under and by virtue of the alleged judgment of the said United States Circuit Court of Appeals in the said return mentioned, and (2), under and by virtue of the decision of the Supreme Court of the United States denying petitioner's petition for a writ of certiorari in the said return alleged, he denies the allegations and each of them of the said return, and he avers, as matter of law that the effect of the action of each of the said Circuit Court of Appeals and Supreme Court of the United States was only to leave unaffected and in apparent force and effect the pretended judgment of the said District Court of the United States for the Eastern Division of the Northern District of Alabama, of the 20th day of August, 1920, and he alleges, as matter of fact, that the record of the cause in which the pretended judgment
49 was rendered as the same existed in the said Circuit Court of Appeals and Supreme Court of the United States did not, and does not, present or involve the question of the invalidity of the said judgment by reason of the matters and things respecting the same in his petition herein set forth and shown; and respecting this he refers to what is more particularly in that behalf hereinafter set forth and shown.

(7) He denies that, as in said return alleged, the questions which he seeks by his petition to raise have already, or at any time, been before the Supreme Court of the United States or the said Circuit Court of Appeals of the United States, and he denies that in either of the said courts the said questions or any of them were presented, involved or considered, and in support of this his denial he refers to the record and records of the cause in the said Supreme Court and Circuit Court of Appeals, and each of them.

(8) He denies that, as in the said return alleged, he has already, or at any time, litigated in the said Circuit Court of Appeals and the Supreme Court of the United States, or either of them, the question whether or not he was lawfully tried in the manner prescribed by law, and he denies that, as in said return alleged, the said last mentioned courts have, or that either of them has, decided or rendered judgment to the effect that he, petitioner, had been and was in fact lawfully tried in the manner prescribed by law.

(9) Respecting the allegations and averments of the said return in the particulars following, namely, (1), that the pretended record in the cause of the United States against petitioner and others, in the District Court of the United States for the Eastern Division of the Northern District of Alabama, that to try the cause came a jury of good and lawful men, duly empanelled, sworn and charged a true

verdict to render according to the law and the evidence, (2), that the question whether petitioner was lawfully tried in the manner prescribed by law was litigated by him in the Circuit Court of Appeals aforesaid and the Supreme Court of the United States, or either of them, and (3), that the said question has at any time, or in
50 any court, heretofore been litigated by him, petitioner, he alleges the facts to be as follows, and not otherwise:

As in and by his petition herein set forth and stated, upon and after his pleading not guilty to the indictment in said cause, there were selected to try the same as pretended jurors eleven persons, and no more, and the said eleven persons only sat and acted in and throughout the pretended trial of said cause as though in fact and in law they constituted and were a lawful jury in that behalf, and at the conclusion of the said pretended trial pretended and purported to render to the court their report that they, the said eleven persons, found petitioner guilty, as in his said petition stated; and it was the duty of the Clerk of said Court to enter in the minutes and record of the proceedings in said cause the fact accordingly, namely, that to try the same came and were sworn and charged the said eleven persons aforesaid. As petitioner is informed and believes, and therefore alleges and charges, the said clerk did in fact prepare and enter in his minutes and the record aforesaid the true recital that to try said cause came and were empanelled, sworn and charged a true verdict to render according to the law and the evidence, the said eleven persons, the same being severally and separately named in the said minutes and record. Subsequently to such action of the said clerk as aforesaid, and the making accordingly of the true record in said cause in that behalf of the coming, empanelling, or swearing and charging of the said eleven persons to try said cause, the said entry and record was abstracted and removed from the book in which the same was made and entered and from the record of the said cause therein, and in place thereof there was erroneously, untruly and falsely made and entered the entry and recital "to try this cause come a jury of good and lawful men, duly empanelled, sworn and charged a true verdict to render according to the law and the evidence," the same importing that there came to try said cause a jury of twelve good and lawful men, as by the constitution and laws of the United States provided and required. Thereupon and
51 thereafter petitioner filed in the said cause, on, to-wit, September 18th, 1920, his motion to strike from the minutes and pretended record in said cause the paragraph last aforesaid, or that the same be amended by the Court so that it would speak the truth and that thereby it would be made clearly to appear that the pretended jury empanelled to try the said cause and render the pretended verdict therein was composed of eleven men only and not twelve, all to the end that petitioner might not be deprived of the right granted him under the constitution of the United States to a trial by a jury of twelve men; which motion coming on to be heard, petitioner produced and offered testimony by competent witnesses that there had in fact been empanelled, sworn and charged to try the said cause and a true verdict to render according to the law and

the evidence, *but* the said eleven persons aforesaid, but the Court refused to accept and admit the said evidence so produced and offered, upon the sole ground that the same was not competent or admissible to contradict or correct the pretended record aforesaid to the effect that there had come to try the said cause a jury of good and lawful men, empanelled, sworn and charged a true verdict to render according to the law and the evidence, wherefore, and wherefore alone, the Court on, to-wit, October 26th, 1920, denied petitioner's said motion and refused to strike out or to cause to be amended the minute or entry aforesaid, for which reason, and for which reason alone, the same remains and stand as though it were the true record, and to such, the action of the court, in refusing to admit the said evidence so as aforesaid produced and offered by petitioner, petitioner by his counsel duly excepted; and on the same day, to-wit, October 26th, 1920, and for the same reasons and none other, the Court similarly denied a motion by petitioner to quash and set aside the pretended judgment rendered in said cause, upon the several grounds, (1), that the judgment entry therein was and is false; (2), that no jury was empanelled in said cause; (3), that the pretended verdict on which said judgment was based was rendered by eleven men and not twelve, and was and is therefore void and of no effect; (4), that
52 the said pretended jury which rendered said pretended verdict on which the said pretended judgment was based was composed of but eleven men and no more, (5), that the recital aforesaid that to try the said cause had come a jury of good and lawful men was and is false and deprived petitioner of his constitutional right to a trial by jury; (6), that petitioner had never been tried by a jury in said cause; (7), that while it appeared from the said judgment entry that a jury was empanelled to try said cause, in truth and in fact not jury was ever empanelled and petitioner was tried in a manner unknown to the law, in that said pretended jury was composed of eleven men only, and said judgment of conviction was and is based solely on a pretended verdict rendered by eleven men and not twelve, and, (8), that the pretended verdict and pretended judgment as appearing in the records of the court were and are a fraud upon the rights of petitioner, intended to deprive him of his constitutional right to a trial by a jury of twelve and lawful men.

Prior to the proceedings last aforesaid in the said cause respecting the motions aforesaid of petitioner to strike out or to amend the erroneous, untrue and false entry and recital aforesaid, and to quash and to set aside the judgment aforesaid, and on, to wit, September 15th, 1920, because the record in said cause is so voluminous that the transcript of the evidence therein could not seasonably be furnished by the stenographer reporting the same, so as to make possible the presentation within the term of a bill of exceptions in the said cause, petitioner and his co-defendants therein prayed that the time for presenting and filing the said bill of exceptions be extended, and thereupon, upon condition that petitioner and his co-defendants should agree to transfer said cause and submit the same before the said Circuit Court of Appeals aforesaid, at New Orleans, at such time after

February first, 1921, as the same might be set down for trial in said Court of Appeals, it was by the said District Court ordered that the time for signing and filing a bill of exceptions on the part of petitioner and his said co-defendants, separately and severally, be, and the same was, extended to and including the first day of
53 December, 1920. Thereafter and subsequently to the proceedings respecting the motions of petitioner aforesaid, good cause in that behalf being shown to the Court, it was by the Court on, to-wit, November 12th, 1920, ordered that the time for presenting and filing the bill of exceptions aforesaid be further extended to and including the first day of January, 1921, but in and by the said order so extending the time it was by the Court prescribed and required that the said bill of exceptions should embrace only all matters excepted to prior to the time of the order and agreement of extension first aforesaid, to-wit, September 15th, 1920, and should not affect any exception taken in said cause after the original order and agreement of extension had been made and entered into, the said order not to apply to any such subsequent exceptions, and further that the said order was subject to the condition that petitioner should consent to the submission of the writ of error in said cause as provided in the original agreement of extension of September 15th, 1920, aforesaid, and, as required, petitioner did, on, to-wit, November 29th, 1920, so consent. Thereafter and within the time for presenting and filing the bill of exceptions in said cause, as last extended as aforesaid, that is to say, by or before the first day of January, 1921, petitioner and his co-defendants in the said cause presented to the said Judge of the said District Court their bill of exceptions aforesaid, and when so doing petitioner submitted as to be included within the said bill the proceedings aforesaid respecting his motions aforesaid, to strike out or amend the erroneous, untrue and false entry and recital aforesaid, and to quash and set aside the judgment aforesaid; but because of the provision in that behalf of the said order of November 12th, 1920, further extending the time for presenting and filing the said bill of exceptions, the said Judge refused to include, and accordingly there was not included, in said bill of exceptions any of the matter relating to petitioner's said motions and the proceedings aforesaid thereon. Wherefore, and wherefore only, none of the said matter and none of the said exceptions was or were included within the said bill of exceptions, so that the record
54 of the said cause as the same was presented to the said Circuit Court of Appeals and the Supreme Court of the United States contained and contains none of the matter hereinbefore set forth and appearing respecting petitioner's said motions and the action of the said District Court thereon, and the said cause was heard and considered by the said Circuit Court of Appeals and the Supreme Court of the United States as though no such motions as aforesaid had been made by petitioner, and no such action thereon had been taken by the said District Court as aforesaid.

(10) And for further reply to the return of the respondent aforesaid petitioner further alleges, avers and charges as follows:

(*a*) That the action of the said District Court for the Eastern Division of the Northern District of Alabama, and the Judge thereof, in refusing as aforesaid to accept and admit the evidence produced and offered by petitioner upon the hearing aforesaid of his motions to strike out or amend the entry and recital aforesaid, and to quash and set aside the judgment in said cause aforesaid, was had at the instance and upon the objection of the United States that the said evidence so produced and offered consisted exclusively of parole testimony, and that such could not be admitted to impeach, contradict or vacate the said entry and recital, and that the action of the said Court and Judge in so denying said motions, and each of them, of petitioner, stands and remains unreversed and unappealed from, and the same was never incorporated in or a part of the record of said cause upon which the same was heard or considered by the said Circuit Court of Appeals or the Supreme Court of the United States, as in the said return mentioned and referred to.

(*b*) That the question whether the said evidence, to-wit, the parole testimony aforesaid, so as aforesaid produced and offered by petitioner upon the hearing of his said motions aforesaid could and might not properly be accepted and received in a pro-
55 ceeding by habeas corpus to test the validity of the said judgment or sentence upon and under which as aforesaid respondent now retains petitioner and restrains him of his liberty, has never been adjudicated or even litigated in any tribunal, cause or proceeding of what kind and character, or at what time, soever.

(*c*) That the true record in the cause respecting the coming, empanelling, swearing and charging of a pretended jury to try the said cause and petitioner under the indictment therein is not as now in the said cause appearing as aforesaid, but was and is, and always has been according to the original minute entry and recital that to try the said cause came and were empanelled, sworn and charged a true verdict to give according to the law and the evidence, the said eleven persons aforesaid and no more and none other.

(*d*) That the only adjudication at any time heretofore made respecting the coming of the said eleven persons to try said cause and the pretented recital respecting the coming of a jury of good and lawful men to try the same, is that the said erroneous, untrue and false recital in that behalf now appearing as of record in the said cause could not be impeached, contradicted or vacated by or through parole testimony offered in the proceeding aforesaid in the District Court itself, having for its object the impeachment, contradiction or vacation by the said Court of the said entry and recital aforesaid, the changing and alteration of the same, or the substitution therefor of another and different entry and recital, through the medium and by the means of parole testimony as aforesaid.

Wherefore, the said return of the respondent notwithstanding, petitioner moves that, as in and by his petition prayed, he be dis-

charged from his imprisonment, detention and custody by respondent in the premises.

DAVID H. RIDDLE,
*Petitioner.*

36 HENRY E. DAVIS,
L. H. ELLIS,
ALEXANDER & MEYERHARDT,
*Attorneys for Petitioner.*

STATE OF GEORGIA,
*County of Fulton:*

Before me, William G. Grant, a notary public in and for said state and county, personally appeared David H. Riddle, who, being by me first duly and legally sworn, deposes and says that he knows the contents of the foregoing reply by him subscribed and that the statements therein made of his own knowledge are true and that those made on his information and belief he believes to be true.

DAVID H. RIDDLE.

Sworn to and subscribed before me this the tenth day of July, 1922.

[SEAL.] WM. G. GRANT,
*Notary Public.*

Notary Public, State at Large, Atlanta, Ga.
My Commission Expires Nov. 22, 1923.

Filed in clerk's office 10 day of July, 1922.
O. C. FULLER,
*Clerk,*
By J. C. BOONE,
*Deputy Clk.*

37 *Order Remanding Petitioner to Custody of Warden, etc.*

Whereas, a writ of habeas corpus has been heretofore issued on the application of David H. Riddle directed to James E. Dyche, warden of the United States Penitentiary at Atlanta, Georgia, commanding him to produce the body of the said David H. Riddle before this court for the purpose of an inquiry into the cause of the detention of the said David H. Riddle by him, the said James E. Dyche, Warden as aforesaid:

And whereas, the said James E. Dyche, Warden as aforesaid, has heretofore brought the said David H. Riddle before the court and has made and filed in the court the return of him, the said James E. Dyche, Warden as aforesaid, to said writ of habeas corpus setting forth the cause of the detention of the said David H. Riddle:

And whereas, the petition and return in said cause, together with the proofs of the respective parties, have been fully heard and considered by the court, and the court having heard the argument of counsel for the respective parties and being fully advised in the

premises, it appears to the court that the said David H. Riddle is lawfully detained under the custody of the said James E. Dyche, Warden of said penitentiary:

It is, therefore, considered, ordered and adjudged by the court that the said David H. Riddle be, and he is hereby, remanded to the custody of the said James E. Dyche, Warden of the United States Penitentiary at Atlanta, Georgia.

In open court this the 12th day of July, 1922.

SAM'L H. SIBLEY,
*United States Judge.*

Filed July 12, A. D. 1922.
O. C. FULLER,
*Clerk,*
By J. D. STEWARD,
*Deputy.*

58 *Exceptions to Order Discharging Writ.*

Petitioner excepts to the order and judgment of the Court discharging the writ of habeas corpus and remanding petitioner on the following separate and several grounds, viz:

1. In not holding that the pretended trial of petitioner by the Judge of the District Court of the United States for the Eastern Division of the Northern District of Alabama (hereinafter for convenience called "Alabama District Court") and eleven persons only, as and for a jury, was and is a nullity, as in conflict with and contrary to the provision of paragraph 3 of Section 2 of Article III of the Constitution of the United States, that the trial of all crimes, except in cases of impeachment, shall be by jury.

2. In not holding that the said pretended trial in manner aforesaid was and is a nullity, as in conflict with and contrary to the provision of Article VI of the Amendments to the said Constitution that in all criminal cases the accused shall enjoy the right to a trial by an impartial jury of the State and District wherein the crime shall have been committed.

3. In not holding that the report of finding (hereinafter for convenience called "pretended verdict") of the eleven persons aforesaid on the pretended trial aforesaid was and is not the verdict of a jury as contemplated and intended by the said provision of paragraph 3 of Section 2 of Article III of the Constitution aforesaid.

4. In not holding that the said pretended verdict was and is not a verdict as aforesaid as contemplated and intended by the said provision of Article VI of the amendments aforesaid.

5. In not holding that upon and by the supposed impanelment of the said eleven persons only, as and for a jury, for the pretended trial of petitioner aforesaid, and the attempted trial of petitioner therewith in and by the said Alabama District Court, the jurisdiction

of the said Court to try petitioner on the indictment against
59 him therein pending ceased and was lost for the time being,
and that such the attempted trial of petitioner was coram non judice, null, void of none effect.

6. In not holding that from and after the supposed impanelment of the said eleven persons only as aforesaid, and the attempted trial of petitioner therewith by the Judge of the said Alabama District Court, all the proceedings in the said Court against petitioner on the indictment aforesaid were coram non judice, null, void and of none effect.

7. In not holding that the pretended judgment of the said Alabama District Court based upon the pretended verdict aforesaid, by reason of which pretended judgment petitioner was and is detained and restrained of his liberty, was, and is, and ever has been, null, void and of none effect.

8. In not holding that the pretended record of the said Alabama District Court, so far as the same recites, or purports so to do, that to try petitioner on the indictment aforesaid came a jury of good and lawful men, duly impaneled, sworn and charged, was and is false.

9. In holding that upon his petition herein petitioner was and is precluded from proving that, as the fact is, the said record was and is false as aforesaid, for that there did not come to try petitioner as aforesaid a jury as aforesaid, and for that he was undertaken to be tried, and was tried, if at all, by the eleven persons only as aforesaid.

10. In holding that by his motion in and to said Alabama District Court to amend the pretended record aforesaid by causing the same to conform to the truth and to show, as the fact was and is, that to try him there did not come a jury as aforesaid but only the eleven persons aforesaid, and by the pretended judgment of the said Court upon his said motion, petitioner was and is precluded herein from contending and showing that the said pretended record was and is false as aforesaid.

11. In holding that by his motion in and to the said Alabama District Court to set aside and vacate the pretended judgment of the said Court by reason of which, as aforesaid, he is detained and restrained of his liberty, and by the pretended judgment of
60 the said Court upon his said motion, petitioner was and is precluded herein from contending and showing that the said pretended judgment first aforesaid was and is null, void and of none effect.

12. In not holding that the said Alabama District Court was without jurisdiction to render the pretended judgment aforesaid by reason of which petitioner is detained and restrained of his liberty as aforesaid.

13. In holding that by reason of anything herein appearing petitioner was and is precluded from contending and showing that the said Alabama District Court was without jurisdiction as aforesaid.

14. In holding that the issues presented and appearing herein have heretofore so been adjudicated against petitioner that the same might and may not be heard and determined herein.

15. In not granting petitioner the relief herein prayed.

16. In denying petitioner such relief.

17. In discharging petitioner's writ of habeas corpus and remanding him to the custody of respondent.

18. In not discharging petitioner from custody and not releasing him from detention and the restraint of his liberty as in and by his petition herein prayed.

19. The Court erred in not holding and adjudging that under the uncontroverted evidence the Government and said Warden, respectively, were and are estopped from asserting or claiming, on the trial of this petition, that petitioner could have, or should have, obtained the relief sought on the motions to amend the judgment, or to set aside the judgment, filed by petitioner in the United States District Court of the Eastern Division of the Northern District of Alabama, and in not holding that the said Dyche, as such Warden, was and is estopped from asserting or claiming that the invalidity or error of the judgment complained of could or should have been taken advantage of by appeal or writ of error.

20. The Court erred in holding that the petitioner is concluded from obtaining the relief sought for and on account of the judgment of the trial court on October 26, 1920, in overruling and denying petitioner's motion to amend or correct the judg-
61 ment entry in said cause.

21. The Court erred in holding that petitioner is concluded from obtaining the relief sought for and on account of the judgment of the trial court on October 26, 1920, in overruling and denying petitioner's motion to set aside and vacate the pretended judgment entry in said cause.

22. The Court erred in holding that petitioner is concluded from obtaining the relief sought for and on account of the judgment of the trial court on October 26, 1920, in overruling and denying petitioner's motions to amend and correct the pretended judgment entry in said cause, and to set aside and vacate said pretended judgment entry.

HOOPER ALEXANDER,
L. H. ELLIS,
*Attorneys for Petitioner.*

*Certificate of Trial Judge.*

STATE OF GEORGIA,
*Fulton County:*

The Honorable Samuel H. Sibley, Judge of the United States District Court for the Northern District of Georgia, hereby certifies that the foregoing exceptions to the order and judgment of the Court discharging the writ of habeas corpus and remanding petitioner were taken, stated and reserved by petitioner in open court at the time the order and judgment of the Court discharging the writ of habeas corpus and remanding petitioner was made.

Dated this 27 day of September, 1922.

SAM'L H. SIBLEY,
*Judge of the United States District Court for the Northern District of Georgia.*

U. S. District Court. Filed in Clerk's Office Sep. 27, 1922.
O. C. FULLER,
*Clerk.*

62 *Petition for Appeal.*

Comes now the petitioner, by his attorneys, and prays the Court to allow him an appeal to the Supreme Court of the United States from the order and judgment discharging the writ of habeas corpus heretofore issued herein, dismissing his petition and remanding him to the custody of the respondent; and in that behalf he submits herewith his assignments of error and statement of the evidence offered, given and received on the hearing of the said petition.

HOOPER ALEXANDER,
L. H. ELLIS,
*Attorneys for Petitioner.*

U. S. District Court. Filed in clerk's office Sep. 27, 1922.
O. C. FULLER,
*Clerk,*
By C. A. McGREW,
*Deputy.*

*Order Allowing Petitioner and Present Appellant an Appeal in said Cause.*

On reading the petition of petitioner, David H. Riddle, for the allowance of an appeal from the Judgment of the United States District Court for the Northern District of Georgia, entered on the 12th day of July, 1922, dismissing his petition for habeas corpus,

and remanding him to the custody of James E. Dyche, Warden of the United States penitentiary at Atlanta, Georgia, it is: ordered that an appeal be and the same is hereby allowed to the said David H. Riddle from the judgment of the said United States District Court for the Northern District of Georgia, and from the judgment of said District Judge, as prayed for in said petition; and it is further ordered that said petitioner shall file a cost bond in the sum of two hundred and fifty dollars, conditioned as provided by law.

Dated this 27 day of September, 1922.

SAM'L H. SIBLEY,
*United States District Judge.*

U. S. District Court. Filed in clerk's office Sep. 27, 1922.
O. C. FULLER,
*Clerk,*
By C. A. McGREW,
*Deputy.*

63 *Statement of Evidence.*

On the hearing of the above entitled matter before the Honorable Samuel H. Sibley, United States Judge of the above entitled Court, petitioner offered and gave, and the Court admitted and received, evidence as follows:

By B. S. DORMON, who testied as follows:

On direct examination:

My occupation is shorthand reporter. I am familiar with the case of the United States against David D. Riddle and others, that was tried before the District Court of the United States for the Eastern Division of the Northern District of Alabama in August, 1920; I reported the testimony on that trial throughout, with the assistance of another reporter, we took it in relays. I was present at the time the defendants in that case, including the petitioner, were called upon to plead to the indictment and at the time of undertaking to impanel the jury in the case; there were eleven jurors impaneled to try the case and no more; I sat at my table reporting the case as it progressed from time to time up to its close, during all that time eleven persons sat as constituting the jury throughout the entire trial. I am not quite positive that I was present when the verdict was rendered, to the best of my judgment I was not actually in the court room when the jury reported; my recollection is that I came into the court room a very few minutes after the jury reported and that the jury was still there.

I reported the proceedings in that case having for their object the amendment of an entry on the record. I have been a shorthand reporter something like fifteen years and during that time have had a great deal of experience in court reporting; I am official reporter of the Seventh Judicial Circuit of Alabama and have held that posi-

tion, continuously, for the past five years. I came to act as reporter at the trial inquired of under employment by the United States Government and by the defendants, jointly, to report the testimony. I correctly and truthfully reported what occurred. I reported the testimony on that trial; I transcribed that testimony, and at the
64 time I transcribed it I made the carbon copy here presented; it is the testimony taken on the motion to amend the minute or judgment entry and the motion to quash the judgment; the trial before the jury was on August 20th and that was in October, October 26 is my recollection, following. I think that I can, without refreshing my recollection by my notes, state what happened on that occasion respecting the proffer of testimony by the petitioner and the rulings of the Court; to the best of my recollection, each question that was asked each witness regarding the formation of the jury and the number of jurors who served was objected to by the Government and the objection was sustained by the Court and the testimony not heard; to the best of my recollection the offer was made to prove that the jury consisted of but eleven persons; as I recall, the ground of objection was that it was parol proof and not admissible to change or correct a record and the Judge sustained the objection, and on that ground the testimony was refused admission. I don't now recall the names of the witnesses, except myself, by whom it was offered to prove that there were but eleven men on the jury; my recollection is that the District Attorney himself was summoned and undertaken to be examined, and also the Clerk of the Court; without referring to my shorthand notes I cannot give the names of the witnesses.

On cross-examination:

Whether other jurors were present at the time the eleven were selected, I don't recall how many there were present; whether it is true that the defendant had exhausted his strikes all but one or two I don't remember about, but I remember their sending for more talesman. Counsel asked, as I recall, that they be allowed to try with eleven, or agreed to try with eleven, probably asked to be allowed to try with eleven; ten or eleven attorneys represented the defendants, that many or probably more, there were a large number of attorneys in the case; it is my recollection that it was at the solicitation of the defendants' counsel that they went on with eleven jurors, I don't know why they did not want the twelfth one. The defendant (petitioner) was present when that proposition was made to go on
65 with the eleven; I don't recall an agreement by the defendant and his counsel that the record should show a legal jury. I made some memorandums at the time about the organization of the jury and the court, I conceive that I am not required to do that, but for my own information I do. I was there for the purpose of reporting, taking the testimony; it is not my duty to keep the records of the organization of the jury for the District Court of the United States for the Northern District of Alabama; I have nothing to do with that under the law, that is a matter for the Clerk and Judge, it

is no part of my duty as I conceive it to take these preliminary matters.

By L. H. ELLIS, who testified as follows:

On direct examination:

I reside at Columbiana, Alabama, am a lawyer since June 1, 1909, have known petitioner all my life and have knowledge of the case of the United States against D. H. Riddle and others, which was tried in the District Court of the United States for the Eastern Division of the Northern District of Alabama in August, 1920; I was one of the attorneys of record and represented petitioner at the trial of that case. I was present throughout the trial and recall when the defendants were arraigned and called upon to plead, they pleaded not guilty. Following that plea of not guilty, I was present when the attempt was made to secure a jury to try the case. Twelve jurors were placed in the box, the Government excused some and the defendants excused some; it became necessary and the Marshal was sent out to bring in other jurors, the regular panel having been exhausted; my recollection is that some of those talesman were put upon the jury and some were excused and some were not, but only eleven men were in the jury box and had been accepted by the United States and by the defendants, and it was agreed in open court that the trial should proceed before those eleven men; that was agreed to by the government and the defendants and the Court permitted that to be done. Eleven men, and eleven only, were actually sworn to sit as jurors in that case, and throughout the trial no more than those eleven at any time sat as pretended jurors in the case. When
66 the verdict was rendered I was not actually in the room, but I came in while they were still standing in the box, there were eleven only, the same eleven who had sat from the beginning.

I was present at the hearing before the District Judge, Judge Grubb, on the motions to amend the entry and quash the judgment, my recollection is that the date was October 26, 1920. The motion to amend the record in reference to the recital of a jury of good and lawful men was tried first. The petitioner offered an affidavit made by him and also an affidavit made by me and one made by Mr. B. S. Dorman, three affidavits which were in proper form that eleven jurors and eleven only tried that case. The Government's attorneys objected to each of those affidavits on the ground that they were parol evidence and not admissible to vary or amend the record, in other words, that parol evidence was not admissible for the purpose of changing that record in the manner sought in the motion. The Court sustained that objection in each instance excluding those affidavits, and to each of those several rulings the petitioner excepted then and there. One of the jurors was placed on the stand and having stated that he was one of the jurors who sat on the trial of that case and determined it, the question was then propounded to him whether or not twelve or eleven men sat, the question was in effect, if it was not a fact, that eleven jurors and eleven only tried that case.

The Government's attorneys objected on the ground that parol testimony was not admissible for the purpose of amending the court record, the amendment directed to the recital in that part of the minutes with reference to the jury of twelve men. The Court sustained that objection and the petitioner excepted. Other witnesses were examined, the Clerk of the Court, the United States District Attorney, the Marshal, and each of them was asked if it was not a fact that eleven jurors, and eleven only, sat on that case and tried and rendered the verdict which then appeared on file and on which the judgment was based; in each instance the Government's attorneys objected on the ground that parol testimony was not admissible for the purpose of varying or modifying or amending the record, and in each instance the Court sustained that objection and the petitioner excepted.

In each instance petitioner, by his counsel, offered to prove
67 the fact that eleven men sat; when each of the questions was propounded to these witnesses and before the Court ruled thereon and immediately after objection on the part of the Government's counsel, counsel representing the petitioner stated in open court that he expected the answers of each of the witnesses to show that only eleven men sat, and the Court adhered to its ruling that it being in the form of parol testimony, it could not be accepted.

I had something to do with preparing the bill of exceptions in the case. I requested the Judge when the bill of exceptions was settled to incorporate in that bill, as a part thereof, what took place on the trial of these motions; I presented that to the Court in written form, the Judge declined to do it; he said that the original order of extension of the time to file the bill of exceptions provided that the bill should contain nothing, and contained no exceptions reserved or proceedings had, after the trial of the main case, and he declined to put in the motion to amend and the motion to vacate and set aside the judgment and the rulings thereon for the reasons stated, namely, that the extension of time that he had granted for filing and setting the bill of exceptions provided that the bill of exceptions should contain nothing that took place subsequent to the main case, the original order for extension of time for filing the bill; and so that matter was not, nor was any part of it, included in the bill of exceptions; that written paper that I presented to him set out the motions verbatim, as I recall it, the questions and answers of the witnesses and rulings of the Court, exactly as they were made at and taken on the trial of these motions, including the exceptions and everything that took place on the hearing of the motions referred to. I presented this matter and His Honor refused it on the ground which I have stated.

The witness was here presented a record and being asked to state whether or not it was the record on which the case was heard in the Court of Appeals, counsel for the respondent admitted that it was such and also that it was the record on which petitioner's petition for the writ of certiorari to the Supreme Court of the United States was based; whereupon, the witness, resuming, further testi-
68 fied: I have examined this record and am perfectly familiar with it; it does not contain any of those matters pertaining

to the motions, or the rulings of the Court or the evidence thereon in the District Court. I know how the assignment of error referred to in the return as relating to this matter of the motions and the proceedings respecting same happens to be in the record. Judge Grubb required us to present a writ of error together with assignments of error before he would sign and settle the bill of exceptions. Those assignments of error were prepared by Mr. Hugo Black and myself and one of them was based on the action of the lower court in overruling the motions to amend the record and quash the judgment, depending upon our hope and expectation that at the time the bill of exceptions was settled and signed or approved by Judge Grubb he would incorporate in it what actually took place on the trial of such motions before him according to the copy of the written instrument I tendered him at the time of the signing and settlement of the bill of exceptions and which I now hold in my hand; that was not incorporated in the record, however, in other words, Judge Grubb, as I have stated, declined to incorporate in that bill of exceptions what took place on the trial of the motions referred to, and that being out, left the assignments of error unsupported; the writ of error and assignments of error were presented to Judge Grubb all at the same time and place and date, so as it stands the assignment was prepared in anticipation that the matter respecting those motions would go into the bill of exceptions, and when the matter was excluded, through inadvertence or otherwise the assignment of error was left in the record and was not taken out.

On cross-examination:

The motion made before Judge Grubb to reform the record as to a good and lawful jury was heard October 26, 1920; I have a copy of his rulings on that in my possession. That was carried to the Supreme Court on application for a writ of mandamus, however, I was not counsel in that; that is the case on page 450 in the 255 United States Reports, the case of Exparte Riddle, petitioner; that was an effort to require Judge Grubb to do what we had applied for him to do in October, to correct that record. Judge Grubb, after hearing that testimony on our motion to reform the record,
69 denied that motion, passed an order. I cannot quote the exact language of it, to the effect that after hearing the evidence and argument, the Court being of opinion that the record is as it should be and does not need amendment, denied the motion and similarly denied the motion to set aside the judgment, and passed an order to that effect; it was that denial that was carried up on mandamus with the request that the Supreme Court require him to make the correction, that is what I understand to have been the nature of it and I have read so. On page 216 of Volume 279, Advance Sheet No. 2 of the Federal Reporter, issued June 1, 1922, is the opinion of the Circuit Court of Appeals of the Fifth Circuit in this case on writ of error to the District Court. I have a certified copy of the order denying the motion, this is it (produces paper). This paper contains Judge Grubb's ruling on only the first motion,

the motion to amend; I have a certified copy of the other (produces same; and it was agreed by counsel for petitioner that each of the said papers produced by the witness might at this point be received in evidence).

On redirect examination:

At the hearing of those motions, respecting what, if any, evidence offered by the petitioner was heard by the Court, it was proved by the Clerk of the Court that there was not then any record evidence or data of any kind whatsoever in his office or that he knew anything about showing the number of jurors that tried the case; it was also shown that there was no record evidence in the Marshal's office at that time, or that he knew anything about, to show the number of jurors who tried the case; the District Attorney, Mr. Earl Pettus, was examined and he testified that there was no record evidence in his office or that he knew anything about at that time showing the number of jurors who tried the case; the Court stated from the bench that he kept nothing that showed the number of jurors that tried the case, and that he made no bench notes that showed that fact. And as respects any attempt made to show that there had been records that were then missing, the question was whether or not the District Attorney had not framed the judgment to be entered up by the Clerk reciting that there were eleven jurors and if that had not been incorporated in the record by the
70 Clerk soon after the trial and if it had not been withdrawn and the one complained of inserted, I can't state the exact language, but that is the substance of it. The Assistant District Attorney, Mr. Quinn, representing the Government, objected to that question on the same ground as directed to the other questions, namely that it was parol evidence and not admissible for the purpose of varying a judgment as it stood, and the Court sustained that objection, but before the Court sustained it, counsel for the petitioner stated in open court that they expected him to answer it in the affirmative and to show that there had been an original record prepared and incorporated in the minutes of the Court showing that the eleven jurors had tried the case and later that it had been taken out and the one complained of substituted, and thereupon the Court sustained the objection, would not let us prove it, and petitioner excepted.

I have stated all the testimony that was had at that trial on these motions, except, of course, the preliminary questions leading up to the main fact upon which they were asked to testify, namely, the acceptance of eleven jurors and the absence of record evidence, except for that I think I have related all that was given there. There is one explanation I want to make, that is, I stated while ago that the paper I presented to Judge Grubb at the time the bill of exceptions was settled and approved, the paper in reference to what took place on the hearing of the motions, contained a verbatim copy of what took place at the hearing on the motions; I did not mean literally what I said, what I did present was a paper setting

up what took place in the proper way, showing reservations of exceptions and the Court's action in reference to the several instances refusing to permit us to introduce the parol testimony referred to; it did not set out the stenographic notes verbatim, I did not mean that, but it truly and correctly stated what took place on the motions and the exceptions added and the rulings of the Court and things of that sort; in other words, it was made up in the usual form for inclusion in a bill of exceptions and its inclusion was refused for the reasons I stated.

And thereupon counsel for petitioner read from the main record aforesaid the following appearing on page 969, omitting the caption:

71 "Defendants having applied for an extension of time for presenting and for filing a bill of exceptions in this case, and the Court being willing to grant said extension on condition that defendants shall agree to transfer said cause and submit the same before the Circuit Court of Appeals at New Orleans at such time after February 1st, 1921, as same may be set down for trial in said Court of Appeals, it is therefore agreed by defendants that said cause may be transferred to the Circuit Court of Appeals at New Orleans and tried at such time after said February 1st, 1921, as the same may be set down for trial in and by said Court," the same being signed by counsel for the respective parties.

Followed by what appears on page 971, viz:

"Come the defendants separately and severally and aver that on account of the fact that the record in this case is so voluminous, and because they have been advised by the stenographer who reported the case that he will not be able to furnish a transcript of the evidence until about the 1st of October, it is impossible to present within the term a bill of exceptions in said cause, and for that reason pray that an order be made extending the time for presenting and for filing in said cause a bill of exceptions." Similarly signed by counsel for the respective parties.

Followed by the order of the Court appearing on page 972, viz:

"The above petition having this day been presented to the undersigned, it is ordered by the Court, and it is the judgment and decree of the Court, that the time for signing and filing a bill of exceptions on the part of said defendants, separately and severally be and it hereby is extended to and including the 1st day of December, 1920.

"This the 15th day of September, 1920.

W. I. GRUBB,
*Judge.*"

Followed by what appears on page 973 of the record, viz:

"In this case for good cause shown, it is ordered that the time for presenting and filing the bill of exceptions embracing all matters excepted to prior to the time of the order and agreement of exten-

sion heretofore made and entered into, but not affecting any exceptions taken in said cause after the original order and agreement of extension was made and entered into; this order not ap-
72 plying to any such subsequent exceptions; be and it is hereby extended to and including the 1st day of January, 1921, subject to the condition that the defendant, David H. Riddle consent to a submission of the writ of error as provided in the original agreement of extension.

"Given this 12th, day of November, 1920.

W. I. GRUBB,
*District Judge.*"

Followed by what appears on page 974, viz:

"I hereby consent to the submission of the writ of error in the Court of Appeals in this cause as provided by the original order extending the time for the signing of the bill of exceptions in said cause.

DAVID H. RIDDLE.

Dated 11/29/20."

By JAMES F. MATHEWS, who testified as follows:

On direct examination:

I reside at Anniston, Alabama, am by profession a lawyer, have known petitioner sixteen or seventeen years, he resides at Talladega and during the time I have known him he has always been a resident of the State of Alabama. I represented Mr. Savage as attorney in both trials in the District Court for the Eastern Division of the Northern District of Alabama in the case of United States vs. Riddle and others. Referring to the trial in August, 1920, I was present when the defendants were arraigned and pleaded not guilty; I was present throughout the entire trial, from the time it was entered on until the verdict was rendered. Eleven men were actually impanelled and sworn as a jury to try that case, and to the best of my knowledge the same eleven men sat throughout the trial until the rendition of the pretended verdict; I was present when the verdict was rendered and those same eleven men who began as a jury were the ones that returned the pretended verdict. The Clerk of that Court is Colonel C. J. Allison and his deputy at Anniston is Mrs. E. J. Pope; as such deputy, she was, to the best of my knowledge, in charge of the Clerk's office at Anniston. A short time after the verdict was rendered, a few days after, I was in the office of the deputy clerk; I asked her whether she had written up the judgment in this case and in response to that request she exhibited to
73 me a sheet of legal cap paper, typewritten, I am unable to quote the contents of this document whatever it was, I can state the substance of it to the best of my recollection. My recollection is that this document had the caption of the case and that it recited the action of the Court as to demurrers about the various counts of the indictment; that it then recited that issue was joined

and recited the rendition of the verdict, naming the eleven men, individually by their names, as jurors who had rendered this verdict of guilty. I am entirely vague as to whether the document concluded with the sentence imposed by the Court or not, I did not look for that matter, in fact my entire interest might be said to be academic in the case at that time, therefore I made no copy and asked no copy of this copy. In saying that my interest was academic at that time, I mean that I had decided as an attorney not to assail this verdict by reason of an agreement, and I mean also that I had advised my client, and he was acting on the advice, not to pursue the case any further, so far as he was concerned. I am satisfied that I communicated what I thus learned from information given me by the Clerk and the exhibition of that paper to counsel for the petitioner here, my impression is that it was either Mr. Hugo Black or Mr. Ellis, possibly both of them, and I think I spoke of the matter to other attorneys in the case, each defendant had his attorneys and we were all banded together, and I may have told some of them about it. I can't remember whether this was at the hearing of the motion made by the petitioner or some time previous to that, I remember being in Mr. Black's office in Birmingham a short time after the case was tried and it may be that I told Mr. Black about it at that time, I could not have told Mr. Black at the hearing because he was not present at the hearing. The paper which the deputy Clerk exhibited to me I saw only this one time in her office at Anniston, and whether that paper is now in existence or where it is I do not know.

By JIM C. SMITH, who testified as follows:

On direct examination:

I am a member of the bar and Assistant United States Attorney for the Northern District of Alabama, have been such since April 17, 1920.

74 I participated to some extent in the trial of the case of the United States vs. Riddle and others, in the Eastern Division of the Northern District of Alabama in 1920, I was present at the trial, present when the jury was called and impaneled. I heard the testimony of Mr. Mathews with reference to the minutes prepared and submitted to him by the deputy clerk at Anniston; I don't know whether I have seen that paper or not, I saw something that recited about what he testified to, but whether it was the paper he testified about or not I don't know. I did not see in the office of the deputy clerk at Anniston a written paper in the form of a minute to be entered in this case reciting that there were eleven jurors who returned the so called verdict in the case; from the time the court adjourned I went home to Birmingham, and from that time until the next term of the Court at Anniston I never did come back and don't know what was in the Clerk's office at that place. I made a rough draft of a minute that was to be entered, sent it to the deputy clerk at Anniston for the purpose of being entered in this case, whether it was entered I don't know, I don't know whether it is in

existence or not. In the rough draft that I made I incorporated the jurors who sat in the case by name and sent it to the deputy clerk at Anniston to become a part of the record; I don't know why that minute was not entered; I suppose the deputy clerk prepared the minute that actually is entered, I don't know who prepared it, I didn't; I don't know how it happened to be prepared, I had some relation to it, yes. The deputy clerk recites the minutes, as I understand it, upon the record of the Court by direction of the Judge, and in this particular case I prepared a rough draft of the minutes because that particular deputy clerk said she did not know how to prepare it in keeping with the law, so I prepared a rough draft and sent it to her; whether or not she copied my rough draft or made the minute from her own knowledge and opinion and from her own notes, I do not know. The rough draft was in the form of a minute, typewritten, it did not contain anything that I know of with reference to any other case than the case of the United States vs. Riddle, et al. The rough draft I prepared started on August 16, the day this case started, and it ended with the judgment of the Court in it, and that judgment was
75 rendered (entered?) by direction of the Court, that is by me, I wrote it on a piece of typewriter paper, but it was written at the direction of the Court; I mean that all I wrote was written at the direction of the Court, I got my orders from the Judge himself and prepared it in accordance with those directions and sent it to the deputy clerk at Anniston.

I don't know whether it was entered in the record as I prepared it or not; one substantially like it was entered, but whether or not the original was copied word for word I do not know because I was not there to see it done and I therefore cannot testify whether it was done or not; I have examined the record in this case several times, I state now I don't know whether it is there or not; I said I took my directions and prepared my memorandum by orders of the District Judge for the Northern District of Alabama, who I understand is the Court. As to my having anything to do with preparing the actual minute that is there in the record now and which is set up in the return, I made a rough draft.

And, thereupon, the examination of the witness continued *as* was concluded as follows:

Q. "That is the one that Mr. Mathews talked about?
A. And this one I have been talking about."

By the Court:

Q. "The rough draft that you prepared, was that the one that embodied the names of the eleven jurors?

A. No sir. I prepared a rough draft that set forth the names of all the jurors in this particular case. That rough draft was never submitted to Judge Grubb by me or any one else at that particular time, but I sent that rough draft to the clerk's office at Anniston. Subsequently I told Judge Grubb about it and he Court said 'That is not my entry' or in substance. So then, back before that minute

entry had ever been made upon the records of the court, so far as I know, I prepared another rough draft setting out this judgment in the almost identical words, under the directions of Judge Grubb.

And that rough draft, I suppose, was recorded in this case."

76 Q. That one was in substance like what the Clerk certifies now?

A. Yes sir."

Q. "There were two rough papers involved then?

A. Yes sir, two rough drafts involved."

By Mr. Davis:

Q. "I do not think I could have failed to hear you correctly, but if I am in error correct me because this is important. I asked you a while ago if when you prepared the rough draft which you sent over to the deputy clerk—

A. Which rough draft are you talking about, there were two?"

Q. Pardon me till I finish. You know I am asking you about the first rough draft.

A. All right."

Q. You answered me a while ago that you prepared that commencing with August 16th and that you sent it to the deputy clerk at Anniston and that it contained a recital of the coming of these eleven men by name, is that right?

A. Yes sir, that is right.

Mr. Davis: "That is all."

A. (Continuing:) "But that rough draft was not recorded upon the minutes of the court.

Mr. Davis: "I want to clear up any doubt in the Court's mind?"

Q. "But you do not know what become of the rough draft that you prepared first after you sent it to Anniston, is that right?

A. Why the last time I saw it it was in the waste basket at Birmingham. It was sent back to me and I tore it up."

The foregoing is all the testimony offered and given in behalf of the petitioner.

When the first witness for the petitioner was on the stand and when the first question was asked him as to the number of jurors sitting in the criminal case, the government objected to the testimony stating that they objected to any parol evidence to vary or contradict the record, and also objected to anything that might be offered to contradict the record. Thereupon the Court directed that an exception be allowed and noted and said that he would allow the evidence subject to the objection and exception, and would

77 rule on it at the end of the testimony. At the conclusion of the testimony of the first witness, Dormon, the Government moved to rule out and exclude his evidence on the same grounds as those on which it was objected to when offered. The Court ruled as before, stating that he thought it better to let all the evidence go in for both sides and that he would rule on its effect later. There-

after and at every stage of the evidence the government objected on the same grounds to all evidence contradicting the record and the Court at all times allowed exceptions and announced that he would pass on the evidence at the end thereof.

And thereupon, testimony was offered and given for the respondent and received by the Court as follows:

(1) So much of the transcript of record in the United States Court of Appeals aforesaid as sets out the indictment on which petitioner was tried. The same was part of the Exhibit to the Warden's answer and was marked therein as pages 1 to 21, inclusive, of said transcript. As offered it was duly certified and was admitted without objection. It appears in the present case in the transcript of record as part of the Exhibit to the Warden's answer, and therefore is not set out here in full.

(2) So much of the transcript of record of the United States Circuit Court of Appeals aforesaid as sets forth the proceedings in the trial court from August 16th, 1920 to August 20th, 1920. The same was part of the exhibit to the Warden's answer and was marked therein as pages 103 to 109, inclusive, of said transcript. As offered it was duly certified and was admitted without objection. It appears on the present case in the transcript of record as part of the exhibit to the Warden's answer and therefore is not set out here in full.

(3) The assignments of error No. 113 and No. 114, appearing upon pages 816 to 819, both inclusive, of the record or transcript aforesaid, viz:

"113. Said District Court erred in overruling, over the exception of the defendant, the motion made by him to quash and set aside the judgment rendered in this cause, grounds of which said motion were as follows:

1. The said judgment entry is false.

2. It appears from said judgment entry that the cause was tried and a verdict rendered by a jury of good and lawful men, which said statement is false in this: That no jury was empanelled in said cause.

78 3. The verdict on which said judgment is based was rendered by eleven men and not twelve men, and is therefore, void and of no effect.

4. For that the jury which rendered the verdict on which the said judgment is based was composed of J. W. McClurkin and ten others, a jury of eleven men and no more.

5. For that the recital of the judgment entry "To try this cause come a jury of good and lawful men," is false and deprives this defendant of his constitutional right to a trial by jury.

6. For that the defendant, movant herein, has never been tried by a jury in said cause.

7. While it appears from said judgment entry that a jury was empanelled to try said cause, in truth and in fact no jury was ever empanelled and the defendants were tried in a manner unknown to the law, in that said jury was composed of eleven men only, not twelve, and said judgment of conviction is based solely on a verdict rendered by eleven men and not twelve.

8. For that the verdict and judgment, as it appears in the records of this court is a fraud upon the rights of this defendant, which said fraud is intended to deprive this defendant of his constitutional rights to a trial by a jury of twelve good and lawful men as guaranteed him under Section 2, Art 3, 6th Amendment to the Constitution of the United States when as a matter of fact the alleged jury which tried said cause and on the verdict of which said judgment is based, was not composed of twelve men, but was composed of only eleven men.

114. Said District Court erred in overruling and denying the motion of the defendant to correct the judgment entry in said cause, which said motion was in words and figures as follows:

Comes the above named D. H. Riddle and respectfully shows unto the Court that in the minute or judgment entry as written up by the Clerk of this Court in the above entitled cause, it is, among other things, stated as follows:

'To try this cause, come a jury of good and lawful men duly empanelled, sworn and charged a true verdict to render, according to the law and the evidence.'

That this entry implies and creates a presumption, if it does not assert, that a jury of twelve men were duly empanelled, sworn and charged a true verdict to render according to the law and the evidence. The said statement in said entry is untrue, the truth being that twelve men were not empanelled as a jury in said cause, but only J. W. McClurkin and ten others, a jury of eleven men and no more.

And petitioner is advised and believes that although said cause was tried by a jury of eleven instead of a jury of twelve men, as hereinbefore stated, by reason of an agreement or understanding between the District Attorney, representing the United States, and the Attorney for this petitioner, that said cause should be tried by eleven jurors instead of twelve, which petitioner admits was made and entered into between the attorneys for the respective parties and agreed to by petitioner, said record should speak and disclose the truth and show that a jury of eleven men and not a jury of twelve men were empanelled to try said cause.

Petitioner is further advised that until said minute or judgment entry is corrected and made to disclose what actually transpired on the trial of said cause, said false entry in said judgment will have the effect to deprive this petitioner of his rights guaranteed to him under Section 2, Article III of the Constitution of the United States, and

under Article VI of the Amendment thereto, to a trial by a jury of twelve men.

79 Wherefore,

(*a*) Petitioner prays and moves the Court to amend the said minute or judgment entry or that the Court will order and direct the Clerk of said Court to amend the minute or judgment entry in said cause by making it disclose that the jury trying said cause was composed of eleven men instead of twelve men and of any facts, agreement or understanding which may be regarded as necessary to explain why said cause was tried by said jury of eleven men instead of twelve men;

(*b*) Petitioner further prays and moves the Court to strike from said minute or judgment entry in said cause the following words, where they occur together in said minute or judgment entry, viz: 'To try this cause come a jury of good and lawful men duly empanelled, sworn and charged a true verdict to render according to the law and the evidence,' and substitute in lieu thereof the following as a part of said minute or judgment entry, viz: 'While the jury was being empanelled to try this cause, it was agreed by and between the District Attorney representing the United States and the Attorneys representing each of the defendants respectively, that this cause should be tried by eleven men only composing the jury instead of twelve; whereupon, pursuant to said agreement, to try this cause come said jury of eleven good and lawful men, composed of J. W. McClurkin and ten other only, duly empanelled, sworn and charged a true verdict to render according to the law and the evidence."

(*c*) This defendant, petitioner, further prays and moves the Court that if said paragraph is not stricken from the said minute or judgment entry, that said paragraph be amended by said Court to where the same will speak the truth and where it will be made to clearly appear in said minute or judgment entry that the jury empanelled to try said cause, and which did try said cause and rendered a verdict therein, was composed of eleven men only and not twelve men, to the end that this petitioner may not be deprived of his rights guaranteed him under the Constitution of the United States to a trial by a Jury of twelve men.

——— ———,

*Attorneys for Defendants.*

(4) The decision of the Supreme Court of the United States in Exparte Riddle 255 United States, pages 450 and 451.

(5) Pages 216 to 222, both inclusive, of Advanced Sheet No. 2 of Volume 279 Federal Reporter, dated June 1, 1922.

(6) Pages 969 to 974, both inclusive, of the record or transcript aforesaid, being the agreement with reference to the extension of time heretofore offered for petitioner, with caption and signatures added, viz:

*Agreement.*

In the District Court of the United States for the Eastern Division of the North District of Alabama.

UNITED STATES

vs.

D. H. RIDDLE, W. O. WOOTEN, et al.

Defendants having applied for an extension of time for
80 presenting and for filing a Bill of Exceptions in this cause, and the Court being willing to grant said extension, on condition that defendants shall agree to transfer said cause and submit the same before the Circuit Court of Appeals at New Orleans at such time after February 1st, 1921, as the same may be set down for trial in said Court of Appeals, it is therefore agreed by defendants that said cause may be transferred to the Circuit Court of Appeals at New Orleans and tried at such time after said February 1st, 1921, as same may be set down for trial in and by said court.

HUGO L. BLACK,
L. H. ELLIS,
*Attorneys for D. H. Riddle.*
GEORGE PEGRAM,
*Attorney for S. Graham.*
A. F. FREEMAN,
*Attorney for W. G. Hardy.*
BORDEN BURR,
*Attorney for W. O. Wooten.*
S. W. TATE,
*Attorney for T. E. St. John.*
ERLE PETTUS,
*United States Attorney.*
RALPH W. QUINN,
*Assistant United States Attorney.*

*Order Granting Until Dec.* 1, 1920, *to File "Bill of Exceptions."*

Filed Sept. 15, 1920. Chas. J. Allison, Clerk.

In the District Court of the United States for the Northern District of Alabama.

UNITED STATES

vs.

D. H. RIDDLE, W. O. WOOTEN et als.

Come the defendants, separately and severally, and aver that on account of the fact that the record in this case is so voluminous, and

because they have been advised by the stenographer who reported the case that he will not be able to furnish a transcript of the evidence until about the first of October, it is impossible, to present, within the term, a bill of exceptions in said cause, and for that reason pray that an order be made extending the time for presenting and for filing in said cause a bill of exceptions.

HUGO L. BLACK,
*Attorney for D. H. Riddle.*
BORDEN BURR,
*Attorney for W. O. Wooten.*
GEORGE PEGRAM,
*Attorney for S. Graham.*
A. F. FREEMAN,
*Attorney for W. G. Hardy.*
S. W. TATE,
*Attorney for T. E. St. John,*
By HUGO L. BLACK.

81 The above petition this day having been presented to the undersigned, it is ordered by the Court, and it is the judgment and decree of the Court, that the time for signing and filing a bill of exceptions on the part of said defendants, separately and severally, be and it hereby is extended to and including the 1st day of December, 1920.

This the 15th day of September, 1920.

W. I. GRUBB,
*Judge.*

*Order Extending Time.*

Filed November 15, 1920. Chas. J. Allison, Clerk.

UNITED STATES

vs.

D. H. RIDDLE et als.

In this cause for good cause shown, it is ordered that the time for presenting and filing the bill of exceptions embracing all matters excepted to prior to the time of the order and agreement of extension, heretofore made and entered into, but not affecting any exception taken in said cause after the original order and agreement of extension was made and entered into; this order not applying to any such subsequent exceptions, be and it is hereby extended to and including the first day of January, 1921; subject to the condition that the defendant D. H. Riddle consent to the submission of the writ of error, as provided in the original agreement of extension.

Given this 12th day of November, 1920.

W. I. GRUBB,
*District Judge.*

*Acceptance by D. H. Riddle.*

Filed November 30, 1920. Chas. J. Allison, Clerk.

In the District Court of the United States for the Eastern Division of the Northern District of Alabama.

UNITED STATES

vs.

D. H. RIDDLE et als.

I hereby consent to the submission of the writ of error in
82 the Court of Appeals in this cause as provided by the original order extending the time for the signing of the Bill of Exceptions in said cause.
11/29/20.

D. H. RIDDLE.

(7) The certificates of the Clerk on page 997 of the said record or transcript that the same "is a full, true and correct transcript of the record in the matter of D. H. Riddle, W. O. Wooten, S. E. Graham and T. A. St. John, plaintiffs in Error, vs. United States of America, Defendant in Error, as fully as the same appears of record and on file in my office."

(8) The certified copy of the order of Judge Grubb denying the motion to amend the judgment entry, which was produced in open court by the witness. L. H. Ellis, was introduced in evidence and omitting the certificate of the Clerk of the District Court of the United States for the Eastern Division of the Northern District of Alabama, which was in due and proper form, was in words and figures as follows:

In Open Court, October 26th, 1920, Honorable W. I. Grubb, Presiding.

"UNITED STATES

vs.

D. H. RIDDLE, W. O. WOOTEN, W. A. SAVAGE, A. M. SAVAGE, T. A. ST. JOHN, W. G. HARDY, S. E. GRAHAM.

The motion to amend the record of the judgment entry in this cause coming on to be heard, this day, and the plaintiff appearing by the Honorable Erle Pettus, United States District Attorney, and the defendants all being present in person, and the movent, D. H. Riddle, being present in person and by Attorney, evidence was offered by the movant in support of the motion, and the Court, after hearing the evidence and argument of Counsel for the movant, being

of the opinion that the record of the judgment entry is as it should be, and does not need amendment, and that the motion is not well taken:

It is ordered and adjudged by the Court that said motion be and is hereby denied; and the movant excepts to the ruling of the Court in this behalf.

(9) The certified copy of the order of Judge Grubb denying the motion to set aside the judgment, which was produced in open court by the witness, L. H. Ellis, was introduced in evidence and omitting the certificate of the clerk of the District Court of the United States for the Eastern Division of the Northern District of Alabama,
83 which was in due and proper form, was in words and figures as follows:

UNITED STATES

VS.

D. H. RIDDLE, W. O. WOOTEN, W. A. SAVAGE, A. M. SAVAGE, T. A. ST. JOHN, W. G. HARDY, S. E. GRAHAM.

The motion to set aside the judgment in this cause coming to *to* be heard, this day, comes the plaintiff appearing by the Honorable Erle Pettus, United States District Attorney, and the defendants, all being present in person, and the movant, D. H. Riddle being present in person, and by Attorney, evidence was offered by the movant in support of the motion, and the Court, after hearing the evidence and argument of counsel for the movant, being of the opinion that said motion is not well taken:

It is ordered and adjudged by the Court that the motion be and is hereby denied, and that the judgment heretofore entered in this cause, be and is hereby in all things affirmed; and the movent excepts to the ruling of the Court in this behalf.

For the purpose hereof the following suffices to bring within this statement of evidence the matters thereby intended to be brought and incorporated herein:

(1) The indictment is against petitioner and six others, contains seven counts, and charges the defendants therein named both with having devised a scheme to defraud and to use the United States mails in furtherance thereof (in violation of Section 215 of the Penal Code of the United States), and with conspiracy to commit that offense (in violation of Section 37 of that Code.)

(2) Is the usual record recital of the proceedings in the case, including the following: "To try this cause come a jury of good and lawful men duly impaneled, sworn and charged a true verdict to render according to the law and the evidence"; "We the jury find the defendants (naming them) guilty as charged under Counts 2, 4, and 5 of the indictment, J. W. McClurkin, Foreman"; and the sentence of petitioner to imprisonment in the penitentiary at Atlanta,

Georgia, for thirteen months and a fine of $100 on Count 2 of the indictment, to like imprisonment and fine on Count 4 of the indictment, and to like imprisonment and a fine of $10,000 on Count 5 of the indictment, the said term of imprisonment to be consecutive and not concurrent.

84 (3) The assignments of error referred to are of error in overruling petitioner's motion to quash and set aside the judgment rendered in the cause (Exception 113), and in overruling and denying petitioner's motion to correct the judgment entry in the cause (Exception 114), the main ground of each of said motions having been that petitioner was tried by eleven men only, though with his consent, and that the entry aforesaid "Come now a jury of good and lawful men," etc. was false.

(4) The opinion of the Supreme Court of the United States in Ex Parte Riddle 225 U. S. 450, is accessible in the said report, which is hereby referred to as part hereof, without incorporation herein.

(5) The opinion of the Circuit Court of the United States for the Fifth Circuit in 279 Federal Reporter 216, is accessible in the said report, which is hereby referred to as part hereof, without incorporation herein.

(6) Is the matter hereinabove introduced by petitioner, with only the additions of the caption of the case and the signatures of counsel and the Court in their appropriate places.

(7) Is the usual form certificate of the Clerk of the trial Court to the contents and authenticity of the record in that Court.

The foregoing was all of the evidence that was introduced on the trial of said habeas corpus proceeding.

Thereupon Honorable Samuel H. Sibley, Judge of the District Court of the United States for the Northern District of Georgia, then and there in open court rendered the following oral opinion in said cause:

The Court: The length of time this case has taken has given me time to investigate it independently and the very elaborate argument on both sides has led me to feel like my conclusions may be treated as final; so I will decide the case at once, and give counsel my reasons for deciding as I do.

The return justifies the retention by an exhibit of an apparently regular record of conviction. This record is assailed by a contention that the apparently regular record is really one that the court was not authorized to make or act upon in rendering judgment, because what appears to be a verdict was not really a verdict because rendered not by a lawful jury, but by eleven men acting as such by the
85 consent of the defendant himself.

I have allowed the evidence to be fully introduced on this issue because it seemed to be a novel proposition and doubtful. The duty of the habeas corpus court is really not in dispute between the

parties. Even since the Act of 1867 it has been uniformly ruled that it is not an instrument of review, nor does it have the duty of reversing or correcting an error, but only judges void a detention for want of jurisdiction or power in the court authorizing the detention. In one of the cases in the 93rd U. S. in re Parks, the Supreme Court itself refused to issue the writ, even in a case in which there was no right of review whatever, where the contention was that the facts stated in the indictment constituted no crime. They held that was for the decision of the lower court, and necessarily had been decided in trying the case and sentencing the prisoner.

In re Parks, 93 U. S., 18.

Again in the 100th U. S. the case of Siebold, this Court issued a writ on the ground of the unconstitutionality of the statute on which the charge was founded. They there seem to lay stress on their right to review, stating that a court that has a right to review might release on habeas corpus in advance of a decision on the writ of error where a wrong was apparent to it. I do not know to what extent that idea influenced the Court.

Ex parte Siebold, 100 U. S., 317.

In the Frank case it is that the amending Act of 1867 was commented on as to its breadth, but the same rules were again reiterated; it was held to be a question on habeas corpus not of error, however serious but a question of jurisdiction and right to proceed.

Frank vs. Mangum, 237 U. S., 726.

Now in this case the jurisdiction is attacked because of the illegal organization of the court. This is the fighting ground here. Attempting to find a Federal decision on that point, I noticed one in the 121st U. S. in which it was held that the absence of an indictment by a grand jury was fatal in a felony case; there was nothing to try; and that a change in it by the court, made apparently without the consent of the defendant, also left nothing to be tried, no trial could be had and habeas corpus could be employed to effect a release from the result of the attempted trial.

Three cases, however, are found (I do not remember all of them, but one of them, the latest, is the 203rd U. S.) in which an effort was made to show that the grand jury that made the indictment was not a legal grand jury; one went to the qualifications of its members, one to its acts, one to the number of its members, that it was less than the law permits, but all three went to a general failure to observe the law about grand juries. I don't remember the details, but the statement of the last case was that a failure to observe the law regarding the organization of a grand jury did not affect jurisdiction. The same conclusion was reached in all three cases with reference to grand juries. A case will be found in the 173rd U. S. in which the qualification of the judge was attacked. It was contended that Judge Meek had not been legally appointed and could not hold the court. The Supreme Court held that on habeas corpus that could not be inquired into. He was holding the court, he was apparently the

judge, de facto at least, and on habeas corpus his right to sit as judge could not be inquired into.

Ex parte Bain, 121 U. S., 1.
Harding, 120 U. S., 782.
Wood, 140 U. S., 278.
Wilson, 140 U. S., 575.
Moran, 203 U. S., 96.
Ex parte Wood, 173 U. S., 452.

Now that leaves only the jury, as a part of the court, to be
86 treated of. The case of Thompson v. Utah 170th U. S. unquestionably rules that it was reversible error for a court to proceed with a jury of less than twelve men when acting under the laws of the United States held to be applicable to that trial. The case did not involve a question of express waiver, but merely a silence, though the Court used language in the opinion including express waiver. It did not involve the question of total invalidity on habeas corpus, but only the question of reversible error on writ of error.

In the 195th U. S. you will find the case of Schick. None of you refer to that I believe. In that case there was an express waiver of jury trial. Judge Harlan dissented very vigorously, citing the Utah case in 170th, and the whole line of authorities read here, that a jury was not a jury if it consisted of less than twelve nor could be waived entirely. The majority of the court cited contra a case from Massachusetts, one from Iowa and eight or ten others which have taken the contrary view even in felony cases. The Massachusetts case held a jury of eleven men might try if waiver was made by defendant. That case was cited with approval by a majority of the court against the dissent of Judge Harlan, and this really unsettles my mind considerably as to what the Court would hold now in a case of express waiver. The case, however, went off on another point, the majority finally holding it was a petty offense, not having a right to jury trial.

Ex parte Schick, 195 U. S., 65.

In a case of waiver coming before the Court—I think I have a memorandum here of the reference—in 159 U. S. 95, the Belt case, which was a habeas corpus case (these others were on direct review, but in the Schick case the Supreme Court itself raised the question, the parties did not repudiate their waiver, but the Supreme Court, inasmuch as the record showed it, raised the question itself)—in this Belt case there was a habeas corpus involved. There had been a trial with waiver of jury and conviction. Then there was a second trial of the same party and he was again convicted, as for a second offense. The question was raised whether that former trial was any conviction and involved the question of the nullity of a conviction without a jury. The Supreme Court there held that was a question for the lower court to decide and that it had to decide it, and refused to interfere by holding utterly invalid the conviction on waiver of jury.

Now those are the cases so far as I have been able to find in the United States Supreme Court dealing with the question about waiv-

ing a panel of twelve jurors. Personally I think the waiver can be made without destroying the jurisdiction. I have participated in or observed I suppose fifty felony cases in the State Courts, cases tried by consent with eleven or even ten jurors. I have never known the waiver to be repudiated or any question made about it. Certainly there are many people in the penitentiary so convicted and many persons enjoy their liberty so acquitted.

The ultimate essence of jury trial is the "judicium parium suorum" of Magna Carta; the judgment of men in like walks of life as contrasted with that of officers of the Government, which is prosecuting. Twelve is but a convenient number to ascertain it, fixed by law for the commoner. Nobles were tried in the Lord Hight Stewards Court by from twelve to twenty three of their peers, or by the whole number of the House of Lords, when it was in session.

I am not convinced in my own mind by the reasons given against allowing a waiver of the number. The reason that the public has an interest in the life and liberty of a man such that they can be taken from him only by a jury of twelve provided by the Constitution, I rather think is contradicted by the right to enter a plea of guilty and surrender the right to liberty without any jury at all. A plea is not customarily permitted by the courts, in capital cases—I never saw it done—still I suppose it could be done. It is just thought not to be right to do it.

Now the other reason, that to waive the number of twelve jurors substitutes a tribunal not authorized by law proves a little too much, because the jury in civil cases is as much a jury of twelve as in a criminal case. Similar constitutional provisions apply to both, and similar statutory provisions, yet courts every where entertain verdicts, rendered on waiver, by less than twelve men in civil cases. They do not rule they are mere arbitrations to be enforced by another suit, or decline to review them because there is no verdict, but they hold that the parties agreeing to them are estopped by their agreement, hold that it is a verdict and they proceed to review the errors on the trial. And it seems to me the true rule is this: That there is nothing in the way of such waiver in a civil case and it may be made notwithstanding there is no law authorizing it. Also that there is no absolute thing in the way of its waiver in a criminal case, but that it ought not to be done and that the judge in a capital case, or in a felony case, ought not to permit it, and if he does he commits an error for which he ought to be reversed, even though the party consents to it. I feel like that is the true law of the United States Court.

If I am to pass on this matter "according to justice and the law" in the words of the habeas corpus statute, I must say in justice it seems to me that when an attorney with full knowledge of his rights, advances his case to trial before eleven men on his own proposal, waits until final verdict and judgment pronounced, by which a plea of former conviction is perfected; the justice of it is he ought to stand by what he did. I can't escape feeling that way about it. In my opinion the law of the case is, while a jury of twelve cannot be legally waived in a felony case and the court can be reversed if at-

tempted, evidently if the court during a trial is confronted with a proposition to proceed with eleven jurors and rules it can be done and the trial is proceeded with, a jeopardy ensues, and if a verdict of acquittal is made, that is final. If a verdict of conviction ensues, it may be reversed, but it cannot be disregarded and treated as nothing.

Now another question that we have had raised, on the hearing and considering of all the evidence in the case,—that is the question as to whether I ought to confine the trial to the face of the record,—is a serious one. Here is this court with no power to review, no power to reverse, no right to direct another court to retry a man it thinks has not been tried legally or not tried at all. These questions as to the propriety of a verdict are far reaching. While in this case it appears that only eleven were sworn, it often happens that where twelve are sworn at the beginning of a case, less than twelve render the verdict. It has been ruled that when a juror becomes insane pending the trial and yet remains with the panel, the verdict is not lawful, can be set aside because only eleven considered and rendered it. If a man becomes too sick really to participate in the deliberations, that also has been held a cause for setting it aside. If he becomes detached from the pannel as they render their verdict and only eleven appear and report to the Court, or all twelve
88 do not actually agree to the finding I have no doubt but the verdict would be irregular and could be set aside. And various things might happen that would raise serious questions of fact as to whether or not the verdict that the record shows as regular and all right, really was rendered by twelve men. If a habeas corpus court can go into all that on the idea that such a verdict is utterly invalid, then any distance of time or any distance of place, the most perfect record can be reviewed on the evidence that may be available then and there, and perhaps more harm and more wrong and more untruth will be the result than to stand by the record and put the last responsibility on the court that makes it of having it right and having it speak the truth, putting it also on the parties who are parties to that record to see that it is right, to see that it is true, or to reverse the judge who refuses to make it right or make it true. I do not find it necessary to rule that, though I am very much pursuaded that it is the safe and right conclusion about it.

One thing that I do rule is this, that really the question sought to be litigated on this habeas corpus has already been litigated, either before the trial court or the reviewing court. With a judgment rendered upon it, even though it involves the fact of jurisdiction, it becomes res adjudicata. That was recognized, I think, in the Frank case. The contention there went to the fact that this claimed intervention of the mob overcame the judge and the jury and turned the court from a court into an adjunct of the mob. That very fact, said the Supreme Court, was brought before the trial judge on the motion for a new trial, and he passed upon it and found that it was not true. It was also passed upon by the Supreme Court of Georgia and they found it was not true. And it was held that they had adjudicated that question although the habeas corpus case was between Frank and Mangum and the criminal case had been between Frank

and the State of Georgia. They did not enter into details, but I suppose Mangum, as custodian under authority of the State was considered to be the State itself. The same thing would be true here, the United States was the original party in the court in Alabama, and Dyche, Warden, representative of the United States, is the party here.

Now if we look to what has happened in the present case I do not think the Supreme Court of the United States passed upon this question: I think the very meaning of their decision is that their record did not show a proper exception to the refusal of an offer to introduce any evidence to correct the record, and consequently that that was not before them for decision, but only the propriety of the remedy, the mandamus, I do not suppose the Circuit Court of Appeals undertook to pass on it because the record before them did not show it. But Judge Grubb, to my mind, did pass on it; first when the proposal was made in the trial, that he proceed with eleven jurors, he did rule upon its propriety; and again in the exercise of the duty that rests on every court to see that the record is true and if it is not true to make it true, he entertained a motion to correct his record. He had jurisdiction of that motion no matter whether he had lost it on the trial of the case when the jury was sworn or not. The case had started before him; he had tried it, unquestionably, as a court, up to the point of swearing the jury, and there was a record necessarily to be made of what that court was doing. It seems to me he had the right and had the duty of making a true record of that, and had jurisdiction to entertain the motion that was made before him. That, again, perhaps, brought in question an issue of fact and also an issue of law. The issue of fact is whether or not eleven or twelve jurors sat. The issue of law was whether if only eleven sat, installed by the proposal or consent of the defendant, whether
89 or not that still made a "true and lawful jury"—I believe that was the expression of the record. Now his decision, if it is an adjudication, this court does not go behind, and the evidence of it is only the motion and the judgment on it. The judgment was that that record was a correct record and needed no alteration but was as it should have been. This adverse judgment either on the issue of fact or the issue of law, the correctness of it, I do not think I could question. I think I am bound by it, I think all courts would be bound by it as a judgment, not reversed, by a judge having jurisdiction of the matter before him. Whether right or wrong, it is settled, it is res adjudicata that this record is right as respects this case.

I find that the Supreme Court of Georgia has gone a good way also upon this question in the case reported in 79th Ga. page 785, Daniels v. Towers. There, while the regular judge of the Superior Court was holding court in the court room, a judge of another circuit undertook to hold court in the basement of the court house. I think it has been ruled, either before or since this case, that without authority of law two judges of the Superior Court cannot hold court at the same time in the same court house. There was a conviction of felony under those conditions and the case was carried to the Su-

tempted, evidently if the court during a trial is confronted with a proposition to proceed with eleven jurors and rules it can be done and the trial is proceeded with, a jeopardy ensues, and if a verdict of acquittal is made, that is final. If a verdict of conviction ensues, it may be reversed, but it cannot be disregarded and treated as nothing.

Now another question that we have had raised, on the hearing and considering of all the evidence in the case,—that is the question as to whether I ought to confine the trial to the face of the record,—is a serious one. Here is this court with no power to review, no power to reverse, no right to direct another court to retry a man it thinks has not been tried legally or not tried at all. These questions as to the propriety of a verdict are far reaching. While in this case it appears that only eleven were sworn, it often happens that where twelve are sworn at the beginning of a case, less than twelve render the verdict. It has been ruled that when a juror becomes insane pending the trial and yet remains with the panel, the verdict is not lawful, can be set aside because only eleven considered and rendered it. If a man becomes too sick really to participate in the deliberations, that also has been held a cause for setting it aside. If he becomes detached from the pannel as they render their verdict and only eleven appear and report to the Court, or all twelve
88 do not actually agree to the finding I have no doubt but the verdict would be irregular and could be set aside. And various things might happen that would raise serious questions of fact as to whether or not the verdict that the record shows as regular and all right, really was rendered by twelve men. If a habeas corpus court can go into all that on the idea that such a verdict is utterly invalid, then any distance of time or any distance of place, the most perfect record can be reviewed on the evidence that may be available then and there, and perhaps more harm and more wrong and more untruth will be the result than to stand by the record and put the last responsibility on the court that makes it of having it right and having it speak the truth, putting it also on the parties who are parties to that record to see that it is right, to see that it is true, or to reverse the judge who refuses to make it right or make it true. I do not find it necessary to rule that, though I am very much pursuaded that it is the safe and right conclusion about it.

One thing that I do rule is this, that really the question sought to be litigated on this habeas corpus has already been litigated, either before the trial court or the reviewing court. With a judgment rendered upon it, even though it involves the fact of jurisdiction, it becomes res adjudicata. That was recognized, I think, in the Frank case. The contention there went to the fact that this claimed intervention of the mob overcame the judge and the jury and turned the court from a court into an adjunct of the mob. That very fact, said the Supreme Court, was brought before the trial judge on the motion for a new trial, and he passed upon it and found that it was not true. It was also passed upon by the Supreme Court of Georgia and they found it was not true. And it was held that they had adjudicated that question although the habeas corpus case was between Frank and Mangum and the criminal case had been between Frank

and the State of Georgia. They did not enter into details, but I suppose Mangum, as custodian under authority of the State was considered to be the State itself. The same thing would be true here, the United States was the original party in the court in Alabama, and Dyche, Warden, representative of the United States, is the party here.

Now if we look to what has happened in the present case I do not think the Supreme Court of the United States passed upon this question: I think the very meaning of their decision is that their record did not show a proper exception to the refusal of an offer to introduce any evidence to correct the record, and consequently that that was not before them for decision, but only the propriety of the remedy, the mandamus, I do not suppose the Circuit Court of Appeals undertook to pass on it because the record before them did not show it. But Judge Grubb, to my mind, did pass on it; first when the proposal was made in the trial, that he proceed with eleven jurors, he did rule upon its propriety; and again in the exercise of the duty that rests on every court to see that the record is true and if it is not true to make it true, he entertained a motion to correct his record. He had jurisdiction of that motion no matter whether he had lost it on the trial of the case when the jury was sworn or not. The case had started before him; he had tried it, unquestionably, as a court, up to the point of swearing the jury, and there was a record necessarily to be made of what that court was doing. It seems to me he had the right and had the duty of making a true record of that, and had jurisdiction to entertain the motion that was made before him. That, again, perhaps, brought in question an issue of fact and also an issue of law. The issue of fact is whether or not eleven or twelve jurors sat. The issue of law was whether if only eleven sat, installed by the proposal or consent of the defendant, whether
89 or not that still made a "true and lawful jury"—I believe that was the expression of the record. Now his decision, if it is an adjudication, this court does not go behind, and the evidence of it is only the motion and the judgment on it. The judgment was that that record was a correct record and needed no alteration but was as it should have been. This adverse judgment either on the issue of fact or the issue of law, the correctness of it, I do not think I could question. I think I am bound by it, I think all courts would be bound by it as a judgment, not reversed, by a judge having jurisdiction of the matter before him. Whether right or wrong, it is settled, it is res adjudicata that this record is right as respects this case.

I find that the Supreme Court of Georgia has gone a good way also upon this question in the case reported in 79th Ga. page 785, Daniels v. Towers. There, while the regular judge of the Superior Court was holding court in the court room, a judge of another circuit undertook to hold court in the basement of the court house. I think it has been ruled, either before or since this case, that without authority of law two judges of the Superior Court cannot hold court at the same time in the same court house. There was a conviction of felony under those conditions and the case was carried to the Su-

preme Court. Then habeas corpus was sought and refused, and in affirming it the Court says: "It is not pretended that the record brought to this court on the conviction for burglary gave any intimation of the now alleged special grounds of incompetency, whether as to judge or jury. If they existed, why were they not then disclosed and presented for direct adjudication?" Continuing on page 789, after stating that the question was that there was no jurisdiction in law to try the case under the circumstances, "A writ of error having been entertained as one to the Superior Court, it follows that there has been an adjudication, that the indictment for burglary was well tried by the Superior Court of Fulton County; that decision was the result of a writ of error brought by the convict himself, and we hold that he can not be heard to controvert it upon a writ of habeas corpus, nor can any other person in his behalf." They further say, page 788, "After a judgment of conviction for felony has been affirmed by the Supreme Court on writ of error brought by the convict, the legality of his conviction cannot be drawn into question by a writ of habeas corpus sued out by him, or by another person in his behalf, save for want of jurisdiction appearing on the face of the record as brought from the court below to the Supreme Court. Such affirmance implies that he was tried by a court of competent jurisdiction legally constituted, and nothing to the contrary can be shown otherwise by inspection of the record.

Of course that is not Federal authority, but it goes a long way to substantiate the position taken by counsel for the Government, which I have not been following to its extreme. In the 114th Ga. and 126th Ga., the same court states that an adjudication of the question of jurisdiction could not be reviewed by habeas corpus.

Griffin vs. Eaves, 114 Ga., 65.
McDonald vs. State, 126 Ga., 536.

I fell, gentlemen, that under these authorities there is but one thing I can do and that is to regard this matter as having been settled first by the law making it only an error, not a nullity, to try a case by a pannel of eleven jurors, and second because it has been adjudicated by the motion before Judge Grubb. My judgment, therefore, is to remand the petitioner to the custody of the Warden.

Mr. Davis: Will your Honor not withhold your order until tomorrow, that we may in the meanwhile consider the question of applying for an appeal. When this judgment is presented we will want to appeal to the Supreme Court, and I take it that Your
90 Honor, in conformity with the practice will certify that there exists a probable cause for the appeal, and release the petitioner in the meantime?

The Court: I will hear you about that, if you desire to be heard.

The Court (after argument): I don't think I will meddle with it. I don't feel like it is a case of justice going wrong. I really feel like there has been an affirmed conviction and that means guilt and he ought to suffer the punishment. I prefer, if he is to be released, that the Justices of the Supreme Court release him, which can be done as soon as your appeal reaches them and not interfere myself.

Mr. Davis: I make the most earnest appeal to the Court. Even under the most favorable circumstances this man must go out there and spend the summer before he can apply to the Court for his enlargement.

The Court: Mr. Davis, I think I won't interfere with the sentence of the other court. This case comes from there, and he has had indulgences of that sort, it seems, for two or three years, and all the courts touching it have ruled adversely to him. I really feel like I ought not to interfere with the execution of the sentence of that court beyond what I am compelled to do. My inclination is always towards mercy, and it is always hard for me to do my duty as I see it, but I think it is right that the sentence of the other court ought to apply until some higher court can take action.

91 *Certificate of District Judge.*

STATE OF GEORGIA,
*County of Fulton:*

The foregoing statement of facts is, in all respects, true and correct and the same is hereby settled and approved as a correct statement of the evidence introduced and heard on the trial of the habeas corpus proceedings, wherein David H. Riddle was petitioner and James E. Dyche, Warden, etc. was respondent, and which said cause was heard and tried before Honorable Samuel H. Sibley, United States Judge of the District Court of the United States for the Northern District of Georgia, and it is: Ordered that the same be filed and made a part of the record to be transmitted to the Supreme Court of the United States on the appeal in the foregoing entitled cause.

The foregoing which purports to be the oral opinion delivered by Honorable Samuel H. Sibley at the conclusion of the trial of said cause is true and correct, as the same was delivered by said Judge as aforesaid.

Dated this 27 day of September, 1922.

SAM'L H. SIBLEY,
*Judge of the District Court of the United States for the Northern District of Georgia.*

Filed in clerk's office 27th day of Sep., 1922.
O. C. FULLER,
*Clerk,*
By J. D. STEWARD,
*Dp. Ck.*

92 *Assignments of Error.*

The Court erred as follows:

1. In not holding that the pretended trial of petitioner by the Judge of the District Court of the United States for the Eastern Division of the Northern District of Alabama (hereinafter for convenience called "Alabama District Court") and eleven persons only,

as and for a jury, was and is a nullity, as in conflict with and contrary to the provision of paragraph 3 of Section 2 of Article III of the Constitution of the United States, that the trial of all crimes, except in cases of impeachment, shall be by jury.

2. In not holding that the said pretended trial in manner aforesaid was and is a nullity, as in conflict with and contrary to the provision of Article VI of the Amendments to the said Constitution that in all criminal cases the accused shall enjoy the right to a trial by an impartial jury of the State and District wherein the crime shall have been committed.

3. In not holding that the report or finding (hereinafter for convenience called "pretended verdict") of the eleven persons aforesaid on the pretended trial aforesaid was and is not the verdict of a jury as contemplated and intended by the said provision of paragraph 3 of Section 2 of Article III of the Constitution aforesaid.

4. In not holding that the said pretended verdict was and is not a verdict as aforesaid as contemplated and intended by the said provision of Article VI of the Amendments aforesaid.

5. In not holding that upon and by the supposed impanelment of the said eleven persons only, as and for a jury, for the pretended trial of petitioner aforesaid, and the attempted trial of petitioner therewith in and by the said Alabama District Court,
93 the jurisdiction of the said Court to try petitioner on the indictment against him therein pending ceased and was lost for the time being, and that such the attempted trial of petitioner was coram non judice, null, void and of none effect.

6. In not holding that from and after the supposed impanelment of the said eleven persons only as aforesaid, and the attempted trial of petitioner therewith by the Judge of the said Alabama District Court, all the proceedings in the said Court against petitioner on the indictment aforesaid were coram non judice, null, void and of none effect.

7. In not holding that the pretended judgment of the said Alabama District Court based upon the pretended verdict aforesaid, by reason of which pretended judgment petitioner was and is detained and restrained of his liberty, was, and is, and ever has been, null, void and of none effect.

8. In not holding that the pretended record of the said Alabama District Court, so far as the same recites, or purports so to do, that to try petitioner on the indictment aforesaid came a jury of good and lawful men, duly impaneled, sworn and charged, was and is false.

9. In holding that upon his petition herein petitioner was and is precluded from proving that, as the fact is, the said record was and is false as aforesaid, for that there did not come to try petitioner as aforesaid a jury as aforesaid, and for that he was undertaken to be tried, and was tried, if at all, by the eleven persons only as aforesaid.

10. In holding that by his motion in and to the said Alabama District Court to amend the pretended record aforesaid by causing the same to conform to the truth and to show, as the fact was and is, that to try him there did not come a jury as aforesaid
94 but only the eleven persons aforesaid, and by the pretended judgment of the said Court upon his said motion, petitioner was and is precluded herein from contending and showing that the said pretended record was and is false as aforesaid.

11. In holding that by his motion in and to the said Alabama District Court to set aside and vacate the pretended judgment of the said Court by reason of which, as aforesaid he is detained and restrained of his liberty, and by the pretended judgment of the said Court upon his said motion, petitioner was and is precluded herein from contending and showing that the said pretended judgment first aforesaid was and is null, void and of none effect.

12. In not holding that the said Alabama District Court was without jurisdiction to render the pretended judgment aforesaid by reason of which petitioner is detained and restrained of his liberty as aforesaid.

13. In holding that by reason of anything herein appearing petitioner was and is precluded from contending and showing that the said Alabama District Court was without jurisdiction as aforesaid.

14. In holding that the issues presented and appearing herein have heretofore so been adjudicated against petitioner that the same might and may not be heard and determined herein.

15. In not granting petitioner the relief herein prayed.

16. In denying petitioner such relief.

17. In discharging petitioner's writ of habeas corpus and remanding him to the custody of respondent.

18. In not discharging petitioner from custody and not releasing him from detention and the restraint of his liberty as in and by his petition herein prayed.

19. The Court erred in not holding and adjudging that under the uncontroverted evidence the Government and said Warden, respectively, were and are estopped from asserting or
95 claiming, on the trial of this petition that petitioner could have, or should have, obtained the relief sought on the motions to amend the judgment, or to set aside the judgment, filed by petitioner in the United Staates District Court for the Eastern Division of the Northern District of Alabama, and in not holding that the said Dyche, as such Warden, was and is estopped from asserting or claiming that the invalidity or error of the judgment complained of could or should have been taken advantage of by appeal or writ of error.

20. The Court erred in holding that the petitioner is concluded from obtaining the relief sought for and on account of the judgment of the trial court on October 26, 1920, in overruling and denying petitioner's motion to amend or correct the judgment entry in said cause.

21. The Court erred in holding that petitioner is concluded from obtaining the relief sought for and on account of the judgment of the trial court on October 26, 1920, in overruling and denying petitioner's motion to set aside and vacate the pretended judgment entry in said cause.

22. The Court erred in holding that petitioner is concluded from obtaining the relief sought for and on accunt of the judgment of the trial court on October 26, 1920, in overruling and denying petitioner's motions to amend and correct the pretended judgment entry in said cause, and to set aside and vacate said pretended judgment entry.

HOOPER ALEXANDER,
L. H. ELLIS,
*Attorneys for Petitioner.*

U. S. District Court. Filed in clerk's office Sep. 27, 1922.

O. C. FULLER,
*Clerk,*
By C. A. McGREW,
*Deputy.*

96 *Bond.*

STATE OF ALABAMA,
*Talladega County:*

Know all men by these presents, that we, David H. Riddle, as principal, D. H. Riddle, George R. Burton and W. A. Bonds, as sureties, are held and firmly bound unto the United States of America in the just and full sum of Two hundred, fifty & 00/100 dollars, to be paid to the said United States of America, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 25th day of September, 1922.

The condition of this obligation is such that, whereas, on the 12th day of July, 1922, a suit was pending in the District Court in and for the Northern District of Georgia, between David H. Riddle, petitioner, and the United States of America, represented by James E. Dyche, as Warden of the Federal Penitentiary at Atlanta, and in said cause, on said date, a judgment was rendered against said David H. Riddle, dismissing his petition for habeas corpus and remanding him to the custody of said Warden, and for cost, and the said David H. Riddle has obtained an appeal therefrom to the United States Supreme Court to reverse said decree in said cause:

Now, if the said David H. Riddle shall prosecute said appeal to effect and answer all damages and cost, if he fails to make his plea and appeal good, then the above obligation to be void, otherwise the same is to remain in full force and effect.

DAVID H. RIDDLE. [SEAL.]
GEO. R. BURTON. [SEAL.]
W. A. BONDS. [SEAL.]

Taken and approved this 27 day of Sept. 1922.

SAM'L H. SIBLEY,
*United States Circuit Judge for the Northern District of the State of Georgia.*

97 STATE OF ALABAMA,
*Talladega County:*

The undersigned George R. Burton, as security on the within bond, being duly sworn, deposes and says that he is worth the sum of $1,000.00 or more, over and above his just debts and liabilities and exemptions under the homestead and exemption laws of the State of Alabama.

GEO. R. BURTON.

Sworn to by George R. Burton and subscribed before me this 25th day of September, 1922.

[SEAL.] J. C. BOWIE
*Notary Public.*

STATE OF ALABAMA,
*Talladega County:*

The undersigned, W. A. Bonds, as security on the within bond, being duly sworn, deposes and says that he is worth the sum of $1,000.00 or more, over and above his just debts and liabilities and exemptions under the homestead and exemption laws of the State of Alabama.

W. A. BONDS.

Sworn to and subscribed before me this 26 day of September, 1922.

EMMA HUEY,
*Notary Public.*

I, E. A. Hammett, Judge of Probate of Talladega County, Ala. hereby certify that the within Bond is good for the amount it is meant to secure and if the same were presented to me I would approve it.

This 26th day of Sept. 1922.

E. A. HAMMETT.
*Judge of Probate, Talladega County, Alabama.*

U. S. District Court. Filed in clerk's office Sep. 27, 1922.
O. C. FULLER,
*Clerk,*
By C. A. McGREW,
*Deputy.*

98 *Præcipe.*

Now comes appellant, David H. Riddle, and directs the Clerk of said Court, in making up the transcript of record of appeal in this cause, to set out therein and as a part thereof the following documents and none other, namely:

1. The petition for writ of habeas corpus filed in the Clerk's office in said Court on July 7, 1922.

2. The writ of habeas corpus issued in said cause on the 7th day of July, 1922, together with indorsements thereon, including the return of the United States Marshal, showing execution of said writ.

3. The writ of habeas corpus in said cause on the 7th day of July, 1922, together with indorsements thereon, including the return of said Warden showing that in obedience to said writ he did on the 8th day of July, 1922, produce the body of said petitioner and present appellant in open Court.

4. The answer and return of said respondent, Dyche, filed in the Clerk's office in said Court on the 8th day of July, 1922.

(Noted to Clerk.)

(*a*) Exhibit A to said answer and return is attached thereto and is to be set out in its entirety.

(*b*) The original record attached to said answer and return was stricken, except the following pages thereof, which pages are to be incorporated as a part of said answer and return and as an exhibit thereto, namely: Pages 1 to 21, both inclusive, of said record; pages 103, 104 and 105 of said record; pages 106 to 109, both inclusive, of said record; and pages 115 and 116 thereof these pages should be marked "Exhibit B."

5. Petitioner and present appellant's motion to strike Exhibit to Warden's answer and return, filed in said cause in said Court on July 10, 1922, together with the indorsements thereon, including the order of the Judge of said Court striking certain parts of said Exhibit.

99 6. Petitioner and present appellant's traverse of said answer and return of said respondent, Dyche, filed in said cause in said Court on July 10, 1922.

7. Order remanding petitioner to the custody of said respondent, filed in said cause in said Court on July 12, 1922.

8. Petitioner and present appellant's exceptions to order discharging writ and remanding petitioner to the custody of said respondent, certified to by the Judge of said Court on the 27th day of September, 1922, and filed in said cause on said date.

9. Petition for appeal filed in said cause in said Court on the 27th day of September, 1922.

10. Order allowing petitioner and present appellant an appeal in said cause, signed by the Judge of said Court on September 27, 1922.

11. Statement of the facts, filed in said cause in said Court on the 27th day of September, 1922, and certified to on said date by the Judge of said Court.

12. Assignments of error filed in said cause in said Court on the 27th day of September, 1922.

13. Appeal bond filed in said cause and approved by the Judge of said Court on September 27, 1922.

14. Citation and service thereof, filed in said cause in said Court on the — day of September, 1922.

15. The Clerk's certificate as provided by law.

Witness our hands and dated this 28th day of September, 1922.

L. H. ELLIS,
HOOPER ALEXANDER,
*Attorneys for Appellant.*

I, Clint W. Hager, United States Attorney for the Northern
100 District of Georgia, hereby accept service of the foregoing præcipe, and agree that the papers and documents therein referred to and specified are the sole and only papers, documents and records which are to be included in said transcript of record on appeal.

CLINT W. HAGER,
*United States Attorney for the Northern District of Georgia.*

U. S. District Court. Filed in clerk's office Sep. 28, 1922.

O. C. FULLER,
*Clerk,*
By C. A. McGREW,
*Deputy.*

101 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To James E. Dyche, Warden of the United States Penitentiary at Atlanta, Georgia, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an appeal, filed in the Clerk's Office of the District Court of the United States for the Northern District of Georgia, Northern Division, wherein David H. Riddle is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William H. Taft, Chief Justice of the Supreme Court of the United States, this the 28th day of September, in the year of our Lord One Thousand nine hundred and twenty two.

SAM'L H. SIBLEY,
*United States District Judge for the Northern District of Georgia.*

On this the 28th day of September, 1922, personally appeared Hooper Alexander, before me the undersigned authority, and makes oath that he delivered a true copy of the above and foregoing citation to John W. Henley, Assistant United States District Attorney for the Northern District of the State of Georgia, and makes further oath that said John W. Henley is the Assistant United States District Attorney for the Northern District of Georgia who has said case in hand and who represents the respondent Warden in the same.

HOOPER ALEXANDER,
*Attorney for D. H. Riddle.*

Sworn to and subscribed the 28th day of September, 1922.

[Seal of John W. Jones, Atlanta, Ga., Notary Public, State at Large.]

JOHN W. JONES,
*Notary Public, State at Large.*

U. S. District Court. Filed in clerk's office Sep. 30, 1922.
O. O. FULLER,
*Clerk.*
By C. A. McGREW,
*Deputy.*

I certify that on the 28th day of Sept. 1922, I served J. E. Dyche Personally, by Handing him a copy of the within named Writ.

WALTER AKERMAN,
*U. S. Marshal,*
By R. J. ADAIR,
*Deputy.*

102 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
*Northern District of Georgia, ss:*

I, Olin C. Fuller, Clerk of the District Court of the United States in and for the Northern District of Georgia, do hereby certify that the foregoing and attached 101 pages of printing and writing contains a true copy of the record, assignments of error and all proceedings in the case of David H. Riddle, Petitioner, Appellant, vs. James E. Dyche, Warden of the United States Penitentiary at Atlanta, Georgia, Respondent, Appellee, being Case No. 53 Habeas Corpus and No. 109 Appeals, as specified in the præcipe of counsel therein as fully as the same remains of record and on file in the Clerk's office of the said District Court at Atlanta, Georgia, except that the Original Citation with acknowledgment of service thereon is included therein in the stead of a copy thereof.

In testimony whereof I hereunto set my hand and the seal of the said District Court at Atlanta, Georgia, this the 9th day of October A. D., 1922.

[Seal of the U. S. District Court, N. D., Georgia.]

OLIN C. FULLER,
*Clerk United States District Court for the Northern District of Georgia.*

Endorsed on cover: File No. 29,213. N. Georgia D. C. U. S. Term No. 663. David H. Riddle, appellant, vs. James E. Dyche, warden of the United States penitentiary at Atlanta, Georgia. Filed October 26th, 1922. File No. 29,213.

Office Supreme Court, U. S.
FILED
JAN 27 1923
WM. R. STANSBURY

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1922.

No. 663.

DAVID H. RIDDLE,
*Appellant,*

*vs.*

JAMES E. DYCHE, WARDEN OF THE UNITED STATES PENITENTIARY AT ATLANTA, GEORGIA.

## MOTION OF APPELLANT FOR ADMISSION TO BAIL, OR TO ADVANCE CAUSE FOR HEARING.

HENRY E. DAVIS,
*Attorney for Appellant.*

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1922.

---

No. 663.

---

DAVID H. RIDDLE,
*Appellant,*

*vs.*

JAMES E. DYCHE, WARDEN OF THE UNITED STATES PENITENTIARY AT ATLANTA, GEORGIA.

---

## MOTION OF APPELLANT FOR ADMISSION TO BAIL, OR TO ADVANCE CAUSE FOR HEARING.

---

Appellant, by his attorney, moves the Court to admit him to bail pending his appeal in this cause, or in the alternative, to advance the same for hearing, on the grounds hereinafter set forth.

## I.

## STATEMENT OF THE CASE.

In the District Court of the United States for the Eastern Division of the Northern District of Alabama, at the Fall Term, 1919, thereof, appellant and six others were indicted for violating Sections 215 and 37

of the United States Federal Penal Code, the violation of each of which sections is an infamous offense.

The indictment came on for trial on August 16, 1920, and the defendants severally pleaded not guilty.

To try the defendants, eleven persons and no more were called and sworn as pretended jurors, and the same sat throughout the trial, and at its conclusion rendered a verdict, so-called, of guilty on certain counts of the indictment (R. *passim*); and thereupon appellant was sentenced, as it is said, to the penitentiary at Atlanta, Georgia, wherein he is now confined.

The swearing of the said eleven persons to try the indictment was by understanding and agreement of counsel for the United States and the defendants, with the concurrence and consent of the latter, orally only and not made matter of record, and because at the time and place of trial there were present, qualified and conveniently available as jurors for the purpose, only the said eleven persons. (R. 2, f. 3.)

At the conclusion of the trial, an Assistant United States Attorney, who participated therein, prepared the minute of the so-called verdict to be entered in the case, because the deputy clerk on duty "said she did not know how to prepare it in keeping with the law" (R. 51, f. 74); and this minute, typewritten, recited "that there were eleven jurors who returned the so-called verdict in the case" (R. 50, f. 74), "contained a recital of the coming of these eleven men by name" (R. 52, f. 76). This minute was sent by the Assistant District Attorney to the deputy clerk (R. 51, f. 74), and was seen in the clerk's office by counsel for one of the defendants. It "recited the rendition of the verdict, naming the eleven men, individually by their names, as jurors who had rendered this verdict of guilty" (R. 49-50, f. 73).

The Assistant District Attorney told the Judge who had presided at the trial about this minute, and the Judge "said 'That is not my entry,' or in substance," whereupon under direction of the Judge the Assistant District Attorney prepared another draft, in the language appearing in the Record (R. 51-2, ff. 75-6). The first draft was returned to the Assistant District Attorney, who tore it up. (R. 52, f. 76.)

The recital in the Record is in these words:

> "To try this cause come a jury of good and lawful men duly impanelled, sworn and charged a true verdict to render according to the law and the evidence." ( R. 26, f. 38.)

On September 15, 1920, on condition of defendants agreeing to transfer the cause and submit it to be tried by the Circuit Court of Appeals at such time after February 1, 1921, as the same might be set down for trial by that court (R. 56), the time for signing and filing a bill of exceptions in the case was extended to and including December 1, 1920 (R. 57, ff. 80-1).

On October 26, 1920, appellant moved to amend the entry respecting the jury, so that the same should show that but eleven men, and not twelve, sat as jurors in the case (R. 44, f. 66; R. 54-5, ff. 78-9), offered to prove by sundry witnesses the "fact that eleven jurors, and eleven only, sat on that case and tried and rendered the verdict which then appeared on file and on which the judgment was based" (R. 45, f. 66), and "stated in open court that he expected the answers of each of the witnesses to show that only eleven men sat" (R. 45, f. 67); but, on the "ground that parol testimony was

not admissible for the purpose of varying or modifying or amending the record," and on that ground only, the Court refused to admit the proffered testimony (*ibid*), and ruled as follows (italics supplied):

> "The Court, *after hearing the evidence* and argument of counsel for the movant, being of the opinion that the record of the judgment entry is *as it should be*, and does not need amendment, and that the motion is not well taken,
>
> "It is ordered and adjudged by the Court that said motion be and is hereby denied; and the movant excepts to the ruling of the Court in this behalf." (R. 58-9, f. 82.)

At the same time appellant made a motion to quash and set aside the judgment, on substantially the same grounds (R. 53-4, ff. 77-8), and like action was had thereon. (R. 59, f. 83.)

Subsequently, on November 12, 1920, on application for a further extension of the time for settling the bill of exceptions, the Court made the following order (italics supplied):

> "In this cause, for good cause shown, it is ordered that the time for presenting and filing the bill of exceptions embracing all matters excepted to prior to the time of the order and agreement of extension heretofore made and entered into, *but not affecting any exception taken in said cause after the original order and agreement of extension was made and entered into; this order not applying to any such subsequent exceptions*, be and it is hereby extended to and including the first day of January, 1921; subject to the condition that the defendant D. H. Riddle consent to the submis-

sion of the writ of error as provided in the original agreement of extension (R. 57, f. 81).

As required, appellant consented to the submission of the writ of error at the time prescribed (R. 58, f. 82), but when his bill of exceptions was presented the Court was asked, and refused to incorporate therein the proceedings aforesaid respecting the motions to amend the Record and to quash and set aside the judgment (R. 45, f. 67), and the Record on the writ of error did not contain any of the matters pertaining thereto (R. 45-6, f. 68); but through inadvertence that Record did contain two assignments of error (113 and 114, R. 53-5, ff. 77-9), which had been prepared in anticipation that the matters rejected by the Court would be included in the bill of exceptions, but were not eliminated when those matters were excluded (R. 46, f. 68).

On July 7, 1922, appellant then being in the penitentiary at Atlanta under the sentence pronounced against him in the premises sued out in the District Court of the United States for the Northern District of Georgia, a writ of habeas corpus, which was duly issued (R. 1-6), and after hearing thereof he was remanded to the custody of the Warden (R. 37-8, f. 57). From this action of the Court he duly appealed (R. 41-2, f. 62), but the Court declined to admit him to bail pending his appeal, upon the ground that he had "had indulgences of that sort, it seems, for two or three years," and that the Court thought it "right that the sentence of the other Court ought to apply until some higher Court can take action" (R. 67, f. 90).

## II.

## ARGUMENT.

Proposition: Appellant was illegally tried; the judgment against him is void; even though he may have neglected to avail himself of any other remedy open to him, or may have mistaken his remedy, he is entitled to relief on *habeas corpus;* under that writ all jurisdictional matters, whether or not appearing upon the Record, may be inquired into; and, at the least, upon the principle of reasonable doubt appellant is entitled to his liberty pending his appeal.

1. Appellant was illegally tried.

A jury means twelve, no more, no fewer; diminishing the number impairs the right to trial by jury; the number can not be reduced by consent; and the finding of any other number than twelve is not a verdict upon which judgment can be pronounced.

16 R. C. L. 181 (2); 219 (36); 221-2 (36, 37, 38), and cases cited.

That in the case of trial for an infamous offense a jury of twelve men is the only legally constituted tribunal, and that neither prosecutor nor accused can by waiver or consent constitute a less number as such tribunal, is the declared law of this, and, with few exceptions, every other Court in the land.

Cooley, Const. Lims. (7th Ed.) 455, 575;
Hopt v. Utah, 110 U. S. 574, 579;
Thompson v. Utah, 170 U. S. 343, 353-5;
Capital Traction Co. v. Hof, 174 U. S. 1;
Cancemi v. Peo., 18 N. Y. 128;
Peo. v. Cosmo, 205 N. Y. 91;
State v. Almy, 67 N. H. 274; 22 L. R. A. 744;

State v. Gerry, 68 N. H. 495; 38 L. R. A. 228;
Works v. State, 2 Oh. St. 296; 59 Am. Dec. 671 and note;
Harris v. Peo., 128 Ill. 585, 591;
Jennings v. State, 134 Wis. 307; 14 L. R. A. (N. S.) 862;
State v. Hamey, 168 Mo. 167; 57 L. R. A. 846;
Michaelson v. Beemer, 72 Neb. 761; 9 Anno. Cas. 1181;
Carpenter v. State, 4 How. (Miss.) 163;
Scott v. State, 70 Miss. 247;
Jones v. State, 52 Tex. Cr. 303;
State v. Ned, 105 La. 696; 54 L. R. A. 933;
State v. Rogers, 162 N. C. 656; 46 L. R. A. (N. S.) 38;
Territory v. Ah Wah, 4 Mont. 149;
Queenan v. Territory, 11 Okla. 261; 61 L. R. A. 324;
*In re* McQuown, 19 Okla., 347; 11 L. R. A. (N. S.) 1136.

And when appellant's case was before this Court at its October Term, 1920, on his application for the writ of mandamus (which the Court held not to be the proper remedy) to compel correction by the trial judge of the minute entry of the so-called verdict, the Court in its opinion used this decisive language (italics supplied):

> "The petitioner was indicted for a violation of Section 215 of the Criminal Code of the United States by a use of the mails in furtherance of a scheme to defraud. This is a felony, Section 235, *and therefore, we assume, must be tried by a jury of twelve.*"
>
> Exp. Riddle, 255 U. S. 450.

2. The judgment under which appellant is confined is void, and not merely voidable.

Elliott v. Piersol, 1 Pet. 328;
Peo. *ex rel* Tweed v. Liscomb, 60 N. Y. 559, 568;
*Exp.* Degener, 30 Tex. App. 566, 567 and cases cited;
Harris v. Peo., 128 Ill. 585;
87 A. S. R. 173, note, and cases cited;
Scott v. State, 70 Miss. 247.

3. In every such case relief may be had by *habeas corpus*, and the Court may under the writ look to the judgment under which the petitioner is detained to ascertain whether it be absolutely void for want of jurisdiction in the Court that pronounced it, either because such jurisdiction was absent at the beginning or because it was lost in the course of the proceedings; and in so doing the Court issuing the writ may look beyond forms and inquire into the very substance of the matter, to the extent of deciding whether the petitioner has been deprived of his liberty without due process of law, and for this purpose may inquire into jurisdictional facts, whether they appear upon the record or not.

Frank v. Mangum, 237 U. S. 309, 327, 331;
*Exp.* Wilson, 114 U. S. 417;
Neilsen, Petr., 131 U. S. 176.

4. It matters not that the petitioner may have, or have had, a remedy by appeal, or may have neglected or mistaken his remedy otherwise: in every case of unlawful detention the remedy by *habeas corpus* is of absolute right.

Peo. *ex. rel* Tweed v. Liscomb, 60 N. Y. 559;
*In re* Permstick, 3 Wash. 672, 674-5;
*Exp. Thamm*, 10 Mo. App. 595;
Com. v. Keeper of Phila. Prison, 41 Leg. Int. 94;
*In re* Jarvis, 66 Kans. 329;

*In re* Gribben, 5 Okla. 379;
*Exp.* Koerner, 176 Fed. 478;
State v. Dist. Ct., 35 Mont., 321;
*Re* Neff, 197 U. S. 488;
*Re* James Lincoln, 202 U. S. 178;
Stevens v. McClaughry, 207 Fed. 18, 125;
C. C. A. 102; 51 L. R. A. (N. S.) 390.

In the case last cited the opinion is by Sanborn, Circuit Judge, and characteristically full and lucid.

The learned Judge of the Court below was of opinion that appellant is precluded in the premises upon the ground that the basis of his application for discharge, namely, that he was tried by but eleven men instead of twelve, purporting to act as jurors in the case, is *res judicata*, the essential language of the Court's opinion in this regard being as follows (R. 64, f. 88):

> "One thing that I do rule is this, that really the question sought to be litigated on this *habeas corpus* has already been litigated, either before the trial Court or the reviewing Court. With a judgment rendered upon it, even though it involves the fact of jurisdiction, it becomes *res adjudicata*."

supplemented by the following, speaking of the Judge presiding at appellant's trial (R., 65, ff. 88-9):

> "in the exercise of the duty that rests on every Court to see that the record is true and if it is not true to make it true, he entertained a motion to correct his record. He had jurisdiction of that motion no matter whether he had lost it on the trial of the case when the jury was sworn or not. The case had started before him; he had tried it,

> unquestionably, as a Court, up to the point of swearing the jury, and there was a record necessarily to be made of what that Court was doing. It seems to me he had the right and had the duty of making a true record of that, and had jurisdiction to entertain the motion that was made before him. * * * The judgment was that that record was a correct record and needed no alteration but was as it should have been. * * * Whether right or wrong, it is settled, it is *res adjudicata* that *this record is right as respects this case.*" (Italics supplied.)

Too obviously for discussion, this involves the familiar logical fallacy *ignoratio elenchi.* The question is not what the record says but whether what it says is true, and on *habeas corpus* the latter is the crucial question. To this point the language of this Court in the case of Frank v. Mangum, *supra,* 237 U. S., 309, 331, is explicit:

> "That the due process of law guaranteed by the 14th Amendment has regard to substance of right, and not to matters of form or procedure; that it is open to the courts of the United States, upon an application for a writ of *habeas corpus,* to look beyond forms and inquire into the very substance of the matter, to the extent of deciding whether the prisoner has been deprived of his liberty without due process of law, and for this purpose to inquire into jurisdictional facts, whether they appear upon the record or not."

Very clearly, this means, if it means anything, that it makes no difference what the trial Court may have caused its record to recite as to jurisdictional facts, the Court having jurisdiction of the case on *habeas corpus* may and must in that proceeding ignore the

record, no matter how made, and inquire into and ascertain the jurisdictional facts according to the truth; to hold otherwise would be to hold that, as is the plain truth in this case, by a falsification of the record of his trial and the persistence of the trial court in maintaining that falsification, a citizen accused of crime and under imprisonment therefor may be deprived of his Constitutional right to have the legality of his imprisonment inquired into and determined according to the very truth of the matter.

Wherefore, while it may have been adjudged in this case by the trial court that the record should not be, and was not, amended, it remains as matter of truth that that record is false; and whether it be false or true is the very gist of the inquiry on *habeas corpus*.

An instructive case is that of General Investment Co. v. Lake Shore & M. S. R. Co., decided by this court at this term (No. 34), in which it was held that the overruling by a State court of a motion to set aside service of process on one of several defendants before removal of the cause to a Federal court does not preclude the latter court from examining and passing upon the question after the cause is removed into that court. True it is that in that case the State court's ruling was held to be purely interlocutory and its status in this regard not affected by the removal, and that being interlocutory the power of the State court to reconsider it passed with the cause to the Federal court; but in the instant case the power of the court below to consider the question could not arise until the case passed from the trial court, and the court below having its first opportunity to consider the case on the petition for *habeas corpus* could not then be denied its right or escape its duty to inquire into the case in

accordance with the principle above stated, namely, for ascertainment of the jurisdictional facts whether appearing upon the record or not.

Counsel is not unmindful of the principle, nowhere more clearly stated than by this Court in the Frank case (p. 326), as follows:

> "Mere errors in point of law, however serious, committed by a criminal court in the exercise of its jurisdiction over a case properly subject to its cognizance, cannot be reviewed by *habeas corpus*. That writ cannot be employed as a substitute for the writ of error."

But the office of a writ of error is to remove nothing for retrial but the law, and that for the purpose of reversing or modifying the judgment to which the writ is addressed: it is quite a different thing to ask relief, the judgment notwithstanding. What is sought in the instant case is not to reverse the judgment complained of, but to establish *dehors* the judgment and the record on which it professes to rest, matter not of law but of fact, showing the want of jurisdiction in the court rendering the judgment; and it is exactly that which this Court has so plainly said may always be done under the writ of *habeas corpus* as now liberalized, "in order to safeguard the liberty of all persons within the jurisdiction of the United States against infringement through any violation of the Constitution" (Frank v. Mangum, *supra*, p. 331); and as is aptly said in Peo. v. Liscomb, *supra*, p. 570, "If a process good in form issued upon a judgment of a court having jurisdiction, either general or limited, must in all cases be assumed to be valid until the judgment be reversed upon error, the remedy by writ of *habeas corpus* will be of but little value."

It being therefore the function of the writ to inquire, not into the judgment, but into that on which it purports to rest, and the object of the writ to have it adjudged that notwithstanding the judgment the petitioner is, by reason of the circumstances in and under which it was rendered, deprived of his liberty through a violation of the Constitution, *res judicata* cannot be predicated of the decision of the court rendering the judgment that the record on which it rests "is as it should be" and will not be amended even to accord with the facts the existence of which show the court to have been without jurisdiction in the premises: the writ of *habeas corpus* is aimed not at the judgment but at its setting, and respecting the latter, no view of another court can hamper or otherwise affect the action of the court acting under the writ.

To repeat: the statement "that really the question sought to be litigated on this *habeas corpus* has already been litigated, either before the trial Court or the reviewing Court," is palpably fallacious.

As respects this question, the only matter before the trial Court was whether the record should be amended, and the decision of that Court was that it should not be corrected because it "*is as it should be, and does not need amendment.*"

Obviously, if this be a decision at all, it is a decision that the entry "To try this cause come a jury of good and lawful men, duly impanelled, sworn and charged a true verdict to render according to the law and the evidence," is such an entry as "should be" of a verdict rendered by eleven men and accordingly "does not need amendment:" this only, and nothing more. It is not a decision that twelve men tried the cause,

nor is it a decision that a trial of the cause by eleven men was legal; but assuming it to be the latter, then very plainly it is a decision in direct conflict with and defiance of the Constitution of the United States, in which case appellant's right to release on *habeas corpus* is undeniable, unless it be that this Court is to reverse itself and hold that it is not the Constitutional right of one accused of an infamous offense to be tried by a jury of twelve men and no fewer.

And as respects the suggestion that the question under consideration was litigated before the reviewing Court—presumably the Circuit Court of Appeals —it suffices to say that by the terms of the above-quoted order of November 12, 1920, further extending the time for settling the bill of exceptions, the question was industriously prevented from reaching the reviewing Court and was as industriously excluded from the bill of exceptions, as above shown. And of course if by "reviewing Court" this, the Supreme Court of the United States, could possibly be meant, it is necessary only to remark, what the Court of itself knows, that the matter was before it on application of appellant for the writ of mandamus to correct the record—and only to correct the record—and that this Court decided only that mandamus is not the proper remedy for such purpose.

It stands accordingly that the case in the particular under discussion does not present the question of *res judicata,* and that consideration thereof by the Court below was wholly irrelevant in the premises.

5. At the very least, the case is one in which a certificate of "reasonable doubt" would certainly have

been given in a jurisdiction having such a procedure, and for that reason alone appellant should be enlarged on bail until his appeal may be heard.

For the reasons appearing, appellant prays accordingly, and, further, in the alternative, that his appeal may be advanced for hearing at the earliest day consistent with the business and convenience of the Court.

Respectfully submitted,

HENRY E. DAVIS,
*Attorney for Appellant.*

Office Supreme Court, U. S.
FILED
MAR 16 1923
WM. R. STANSBURY
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1922.

---

No. 663.

---

DAVID H. RIDDLE, *Appellant*,

*vs.*

JAMES E. DYCHE, WARDEN OF THE UNITED STATES PENITENTIARY AT ATLANTA, GEORGIA.

---

## BRIEF IN BEHALF OF APPELLANT.

---

HENRY E. DAVIS,
*Attorney for Appellant.*

L. H. ELLIS,
*of Counsel.*

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

## TABLE OF CONTENTS.


| | Page |
|---|---|
| I. Statement of the Case | 1 |
| II. Assignments of Error | 6 |
| III. Argument | 11 |
| 1. Appellant was illegally tried | 11 |
| (a) Opinion of Court below examined | 12 |
| 2. Judgment against appellant void | 18 |
| 3. Appellant's right to relief by habeas corpus. | 19 |
| 4. Immaterial that remedy by appeal may have existed | 19 |
| 5. Matter of appellant's petition not *res judicata* | 22 |


## LIST OF CITATIONS.


| | |
|---|---|
| 87 A. S. R. 173 | 18 |
| Belt v. U. S., 159 U. S. 95 | 13 |
| Cancemi v. Peo. 18 N. Y. 128 | 11 |
| Capital Traction Co. v. Hof. 174 U. S. 1, | 11 |
| Carpenter v. State, 4 How. (Miss.) 163, | 12 |
| Cooley, Const, Lims. (7th Ed.) 455, | 11 |
| Com. v. Keeper of Phila. Prison, 41 Leg. Int. 94, | 19 |
| Cromwell v. Sac County, 94, U. S. 351, | 28 |
| Degener, *Exp.*, 30 Tex. App. 566, | 18 |
| Elliot v. Piersol, 1 Pet. 328, | 18 |
| Frank v. Mangum, 237 U. S. 309, | 19, 23, 25 |
| General Inv. Co. v. Lake Shore & M. S. R. Co. | 24 |
| Gribben, *In re*, 5 Okla. 379, | 19 |
| Harris v. Peo., 128 Ill. 585, | 12-18 |
| Hopt v. Utah, 110 U. S. 574, | 11 |
| Hoisington v. Brakey, 31 Kan. 560, | 28 |
| Jarvis, *In re*, 66 Kans. 329, | 19 |
| Jennings v. State, 134 Wis. 307, | 12 |
| Jones v. State, 52 Tex. Cr. 303, | 12 |
| Koerner, *Exp.*, 176 Fed. 478, | 19 |
| Lincoln, James *Re*, 202 U. S. 178, | 19 |
| McQuown, *In re*, 19 Okla., 347, | 12 |
| Michaelson v. Beemer, 72 Neb. 761, | 12 |

Page

Neff, *Re,* 197 U. S. 488,..... 19
Neilsen, Petr., 131 U. S. 176,..... 19
Peo. v. Cosmo, 205 N. Y. 91,..... 11
Peo. *ex rel* Tweed v. Liscomb, 60 N. Y., 559,....18-19
Permstick, *In re,* 3 Wash. 672,..... 19
Queenan v. Territory, 11 Okla. 261,..... 12
16 R. C. L. 181, etc..... 11
Riddle, *Exp.,* 255 U. S. 450,..... 12
Schick v. U. S. 195 U. S. 65,..... 15
Scott v. State, 70 Miss., 247,.....12, 18
State v. Almy, 67 N. H. 274,..... 11
State v. Gerry, 68 N. H. 495,..... 12
State v. Hamey, 168 Mo. 167,..... 12
State v. Ned, 105 La. 696,..... 12
State v. Rogers, 162 N. C. 656,..... 12
State v. Dist. Ct., 35 Mont., 321,..... 19
Steam Packet Co. v. Sickles, 24 How. 333,..... 28
Stevens v. McClaughry, 207 Fed. 18,..... 19
Thamm, *Exp.,* 10 Mo. App. 595..... 19
Territory v. Ah Wah, 4 Mont., 149,..... 12
Thompson v. Utah, 170 U. S. 343,..... 11
Wilson, *Exp.,* 114 U. S. 417,..... 19
Works v. State, 2 Oh. St. 296,..... 12

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1922.

---

No. 663.

---

DAVID H. RIDDLE, *Appellant*,

*vs.*

JAMES E. DYCHE, WARDEN OF THE UNITED STATES PENITENTIARY AT ATLANTA, GEORGIA.

---

## BRIEF IN BEHALF OF APPELLANT.

---

### I.

### STATEMENT OF THE CASE.

In the District Court of the United States for the Eastern Division of the Northern District of Alabama, at the Fall Term, 1919, thereof, appellant and six others were indicted for violating Sections 215 and 37 of the United States Federal Penal Code, the violation of each of which sections is an infamous offense.

The indictment came on for trial August 16, 1920, and the defendants severally pleaded not guilty.

To try the defendants, eleven persons and no more were called and sworn as pretended jurors, and the same sat throughout the trial, and at its conclusion rendered a verdict, so-called, of guilty on certain counts of the indictment (R. *passim*); and thereupon appellant was sentenced, as it is said, to the penitentiary at Atlanta, Georgia, wherein he is now confined.

The swearing of the said eleven persons to try the indictment was by understanding and agreement of counsel for the United States and the defendants, with the concurrence and consent of the latter, orally only and not made matter of record, and because at the time and place of trial there were present, qualified and conveniently available as jurors for the purpose, only the said eleven persons. (R. 2, f. 3.)

At the conclusion of the trial, an Assistant United States Attorney, who participated therein, prepared the minute of the so-called verdict to be entered in the case, because the deputy clerk on duty "said she did not know how to prepare it in keeping with the law" (R. 51, f. 74); and this minute, typewritten, recited "that there were eleven jurors who returned the so-called verdict in the case" (R. 50, f. 74), "contained a recital of the coming of these eleven men by name" (R. 52, f. 76). This minute was sent by the Assistant District Attorney to the deputy clerk (R. 51, f. 74), and was seen in the clerk's office by counsel for one of the defendants. It "recited the rendition of the verdict, naming the eleven men, individually by their names, as jurors who had rendered this verdict of guilty." (R. 49-50, f. 73).

The Assistant District Attorney told the Judge who had presided at the trial about this minute, and the Judge "said 'That is not my entry,' or in substance,"

whereupon under direction of the Judge the Assistant District Attorney prepared another draft, in the language appearing in the record (R. 51-2, ff. 75-6). The first draft was returned to the Assistant District Attorney, who tore it up. (R. 52, f. 76.)

The recital in the record is in these words:

> "To try this cause come a jury of good and lawful men duly impanelled, sworn and charged a true verdict to render according to the law and the evidence." (R. 26, f. 38.)

On September 15, 1920, on condition of defendants agreeing to transfer the cause and submit it to be tried by the Circuit Court of Appeals at such time after February 1, 1921, as the same might be set down for trial by that court (R. 56), the time for signing and filing a bill of exceptions in the case was extended to and including December 1, 1920 (R. 57, ff. 80-1).

On October 26, 1920, appellant moved to amend the entry respecting the jury, so that the same should show that but eleven men, and not twelve, sat as jurors in the case (R. 44, f. 66; R. 54-5, ff. 78-9), offered to prove by sundry witnesses the "fact that eleven jurors, and eleven only, sat on that case and tried and rendered the verdict which then appeared on file and on which the judgment was based" (R. 45, f. 66), and "stated in open court that he expected the answers of each of the witnesses to show that only eleven men sat" (R. 45, f. 67); but, on the "ground that parol testimony was not admissible for the purpose of varying or modifying or amending the record," and on that ground only, the Court refused to admit the proffered testimony (*ibid*), and ruled as follows (italics supplied):

> "The Court, *after hearing the evidence* and argument of counsel for the movant, being of the opinion that the record of the judgment entry is *as it should be*, and does not need amendment, and that the motion is not well taken,
>
> "It is ordered and adjudged by the Court that said motion be and is hereby denied; and the movant excepts to the ruling of the Court in this behalf." (R. 58-9, f. 82.)

At the same time appellant made a motion to quash and set aside the judgment, on substantially the same grounds (R. 53-4, ff. 77-8), and like action was had thereon. (R. 59, f. 83.)

Subsequently, on November 12, 1920, on application for a further extension of the time for settling the bill of exceptions, the Court made the following order (italics supplied):

> "In this cause, for good cause shown, it is ordered that the time for presenting and filing the bill of exceptions embracing all matters excepted to prior to the time of the order and agreement of extension heretofore made and entered into, *but not affecting any exception taken in said cause after the original order and agreement of extension was made and entered into; this order not applying to any such subsequent exceptions*, be and it is hereby extended to and including the first day of January, 1921; subject to the condition that the defendant D. H. Riddle consent to the submission of the writ of error as provided in the original agreement of extension (R. 57, f. 81).

As required, appellant consented to the submission of the writ of error at the time prescribed (R. 58, f.

82), but when his bill of exceptions was presented the Court was asked, and refused to incorporate therein the proceedings aforesaid respecting the motions to amend the record and to quash and set aside the judgment (R. 45, f. 67), and the record on the writ of error did not contain any of the matters pertaining thereto (R. 45-6, f. 68); but through inadvertence that record did contain two assignments of error (113 and 114, R. 53-5, ff. 77-9), which had been prepared in anticipation that the matters rejected by the Court would be included in the bill of exceptions, but were not eliminated when those matters were excluded (R. 46, f. 68).

Following the action of the trial Court denying his motion to amend the entry respecting the jury, appellant applied to this Court for the writ of mandamus to require the trial Court to make the desired correction, which application was denied, upon the ground that appellant might have saved the point by an exception at the trial or by a bill of exceptions and then have brought a writ of error; in other words, upon the ground that he had mistaken his remedy.

Exp. Riddle, 255 U. S. 450.

On July 7, 1922, appellant, then being in the penitentiary at Atlanta under the supposed sentence pronounced against him in the premises, sued out in the District Court of the United States for the Northern District of Georgia a writ of *habeas corpus*, which was duly issued (R. 1-6), and after hearing thereof he was remanded to the custody of the warden (R. 37-8, f. 57), upon the ground that the matter of the petition was settled, first, by the law making it only an error, not a nullity, to try a case by a panel of eleven jurors, and,

secondly, because it had been adjudicated by the motion before the trial Judge (R. 66, f. 89).

From this action of the Court the present appeal was taken (R. 41-2, f. 62).

## II.

## ASSIGNMENTS OF ERROR.

The Court below erred as follows:

1. In not holding that the pretended trial of petitioner by the Judge of the District Court of the United States for the Eastern Division of the Northern District of Alabama (hereinafter for convenience called "Alabama District Court") and eleven persons only, as and for a jury, was and is a nullity, as in conflict with and contrary to the provision of paragraph 3 of Section 2 of Article III of the Constitution of the United States, that the trial of all crimes, except in cases of impeachment, shall be by jury.

2. In not holding that the said pretended trial in manner aforesaid was and is a nullity, as in conflict with and contrary to the provision of Article VI of the Amendments to the said Constitution that in all criminal cases the accused shall enjoy the right to a trial by an impartial jury of the State and District wherein the crime shall have been committed.

3. In not holding that the report or finding (hereinafter for convenience called "pretended verdict") of the eleven persons aforesaid on the pretended trial aforesaid was and is not the verdict of a jury as contemplated and intended by the said provision of paragraph 3 of Section 2 of Article III of the Constitution aforesaid.

4. In not holding that the said pretended verdict was and is not a verdict as aforesaid as contemplated and intended by the said provision of Article VI of the Amendments aforesaid.

5. In not holding that upon and by the supposed impanelment of the said eleven persons only, as and for a jury, for the pretended trial of petitioner aforesaid, and the attempted trial of petitioner therewith in and by the said Alabama District Court, the jurisdiction of the said Court to try petitioner on the indictment against him therein pending ceased and was lost for the time being, and that such the attempted trial of petitioner was *coram non judice*, null, void and of none effect.

6. In not holding that from and after the supposed impanelment of the said eleven persons only as aforesaid, and the attempted trial of petitioner therewith by the Judge of the said Alabama District Court, all the proceedings in the said Court against petitioner on the indictment aforesaid were *coram non judice*, null, void and of none effect.

7. In not holding that the pretended judgment of the said Alabama District Court based upon the pretended verdict aforesaid, by reason of which pretended judgment petitioner was and is detained and restrained of his liberty, was, and is, and ever has been, null, void and of none effect.

8. In not holding that the pretended record of the said Alabama District Court, so far as the same recites, or purports so to do, that to try petitioner on the indictment aforesaid came a jury of good and lawful men, duly impaneled, sworn and charged, was and is false.

9. In holding that upon his petition herein petitioner was and is precluded from proving that, as the fact is, the said record was and is false as aforesaid, for that there did not come to try petitioner as aforesaid a jury as aforesaid, and for that he was undertaken to be tried, and was tried, if at all, by the eleven persons only as aforesaid.

10. In holding that by his motion in and to the said Alabama District Court to amend the pretended record aforesaid by causing the same to conform to the truth and to show, as the fact was and is, that to try him there did not come a jury as aforesaid but only the eleven persons aforesaid, and by the pretended judgment of the said Court upon his said motion, petitioner was and is precluded herein from contending and showing that the said pretended record was and is false as aforesaid.

11. In holding that by his motion in and to the said Alabama District Court to set aside and vacate the pretended judgment of the said Court by reason of which, as aforesaid he is detained and restrained of his liberty, and by the pretended judgment of the said Court upon his said motion, petitioner was and is precluded herein from contending and showing, that the said pretended judgment first aforesaid was and is null, void and of none effect.

12. In not holding that the said Alabama District Court was without jurisdiction to render the pretended judgment aforesaid by reason of which petitioner is detained and restrained of his liberty as aforesaid.

13. In holding that by reason of anything herein appearing petitioner was and is precluded from con-

tending and showing that the said Alabama District Court was without jurisdiction as aforesaid.

14. In holding that the issues presented and appearing herein have heretofore so been adjudicated against petitioner that the same might and may not be heard and determined herein.

15. In not granting petitioner the relief herein prayed.

16. In denying petitioner such relief.

17. In discharging petitioner's writ of *habeas corpus* and remanding him to the custody of respondent.

18. In not discharging petitioner from custody and not releasing him from detention and the restraint of his liberty as in and by his petition herein prayed.

19. The Court erred in not holding and adjudging that under the uncontroverted evidence the Government and said Warden, respectively, were and are estopped from asserting or claiming, on the trial of this petition that petitioner could have, or should have, obtained the relief sought on the motions to amend the judgment, or to set aside the judgment, filed by petitioner in the United States District Court for the Eastern Division of the Northern District of Alabama, and in not holding that the said Dyche, as such Warden, was and is estopped from asserting or claiming that the invalidity or error of the judgment complained of could or should have been taken advantage of by appeal or writ of error.

20. The Court erred in holding that the petitioner is concluded from obtaining the relief sought for and on account of the judgment of the trial court on October 26, 1920, in overruling and denying petitioner's motion to amend or correct the judgment entry in said cause.

21. The Court erred in holding that petitioner is

concluded from obtaining the relief sought for and on account of the judgment of the trial court on October 26, 1920, in overruling and denying petitioner's motion to set aside and vacate the pretended judgment entry in said cause.

22. The Court erred in holding that petitioner is concluded from obtaining the relief sought for and on account of the judgment of the trial court on October 26, 1920, in overruling and denying petitioner's motions to amend and correct the pretended judgment entry in said cause, and to set aside and vacate said pretended judgment entry.

These assignments of error may be thus compressed. The Court erred as follows:

1. In not holding that appellant was illegally tried, in that he was tried by eleven instead of twelve men as a jury; and this notwithstanding that he consented thereto.

2. In not holding that the pretended judgment of the Court upon the finding of the said eleven men was and is a nullity and not merely error.

3. In not holding that appellant is entitled on *habeas corpus* to be released of and from the effect of the said supposed judgment and to be discharged accordingly from custody thereunder.

4. In holding that the matter of appellant's petition is *res judicata.*

The substance of the matters thus presented is for convenience expressed in the proposition hereinafter argued.

## III.

## ARGUMENT.

Proposition: Appellant was illegally tried; the judgment against him is void; even though he may have neglected to avail himself of any other remedy open to him, or may have mistaken his remedy, he is entitled to relief on *habeas corpus;* under that writ all jurisdictional matters, whether or not appearing upon the record, may be inquired into; and, the matter is not *res judicata.*

1. Appellant was illegally tried.

A jury means twelve, no more, no fewer; diminishing the number impairs the right to trial by jury; the number can not be reduced by consent; and the finding of any other number than twelve is not a verdict upon which judgment can be pronounced.

16 R. C. L. 181 (2); 219 (36); 221-2 (36, 37, 38), and cases cited.

That in the case of trial for an infamous offense a jury of twelve men is the only legally constituted tribunal, and that neither prosecutor nor accused can by waiver or consent constitute a less number as such tribunal, is the declared law of this, and, with few exceptions, every other court in the land.

Cooley, Const. Lims. (7th Ed.) 455, 575;
Hopt v. Utah, 110 U. S. 574, 579;
Thompson v. Utah, 170 U. S. 343, 353-5;
Capital Traction Co. v. Hof, 174 U. S. 1;
Cancemi v. Peo., 18 N. Y. 128;
Peo. v. Cosmo, 205 N. Y. 91;
State v. Almy, 67 N. H. 274; 22 L. R. A. 744;

State v. Gerry, 68 N. H. 495; 38 L. R. A. 228;
Works v. State, 2 Oh. St. 296; 59 Am. Dec. 671 and note;
Harris v. Peo., 128 Ill. 585, 591;
Jennings v. State, 134 Wis. 307; 14 L. R. A. (N. S.) 862;
State v. Hamey, 168 Mo. 167; 57 L. R. A. 846;
Michaelson v. Beemer, 72 Neb. 761; 9 Anno. Cas. 1181;
Carpenter v. State, 4 How. (Miss.) 163;
Scott v. State, 70 Miss. 247;
Jones v. State, 52 Tex. Cr. 303;
State v. Ned. 105 La. 696; 54 L. R. A. 933;
State v. Rogers, 162 N. C. 656; 46 L. R. A. (N. S.) 38 and note;
Territory v. Ah Wah, 4 Mont. 149;
Queenan v. Territory, 11 Okla. 261; 61 L. R. A. 324;
*In re* McQuown, 19 Okla., 347; 11 L. R. A. (N. S.) 1136 and note.

And when appellant's case was before this Court at its October Term, 1920, on his application for the writ of mandamus as aforesaid, the Court in its opinion used this decisive language (italics supplied):

> "The petitioner was indicted for a violation of Section 215 of the Criminal Code of the United States by a use of the mails in furtherance of a scheme to defraud. This is a felony, Section 235, *and therefore, we assume, must be tried by a jury of twelve.*"
>
> Exp. Riddle, 255 U. S. 450.

The learned Judge of the Court below cited two decisions of this Court in supposed support of the contrary conclusion reached by him, namely, Exp. Belt. 159 U. S. 95, and Schick v. United States, 195 U. S.

65. The briefest examination of these cases will show their utter irrelevancy in the premises.

The case of Belt is this: In 1893 Belt was tried in the Police Court of the District of Columbia for larceny. At the trial, in accordance with the provision of the Act of Congress of July 23, 1892 (27 Stat. L. 261), in that behalf, that in prosecutions in the Police Court of the District in which according to the Constitution the accused would be entitled to a jury trial, the accused might in open court expressly waive such trial by jury and request to be tried by the Judge, in which case the trial should be by the Judge, Belt waived the right of trial by jury, submitted to be tried by the Judge, and was found guilty. Subsequently, in 1894, he was charged in the Supreme Court of the District of Columbia with a second offense of larceny, and the record in the former case was offered as evidence of his first offense. To the introduction of this record in evidence objection was made on the ground that on its face it showed a waiver of the right of trial by jury and a trial and conviction by the court alone, which was claimed to be in violation of the Constitution of the United States and therefore null and void. The objection was overruled and exception taken, and on appeal this ruling was sustained by the Court of Appeals of the District. Belt v. United States, 4 App. D. C. 25.

Thereupon, Belt applied to this Court for leave to file a petition for the writ of *habeas corpus*, upon the ground that the sentence as for a second offense under which he was held was void, because his first conviction was void and of none effect in law, inasmuch as the Constitutional requirement of trial by jury in criminal cases could not be waived by an accused

though in pursuance of a statute authorizing such waiver.

The Supreme Court of the District of Columbia held that the Act of Congress authorizing the waiver of a jury in the Police Court was valid, and the Court of Appeals affirmed this holding.

In dealing with the case this Court stated the question involved as follows (p. 97):

> "Does the ground of this application [for leave to file the petition for the writ of habeas corpus] go to the jurisdiction or authority of the Supreme Court of the District, or, rather, is it not an allegation of mere error? If the latter, it can not be reviewed in this proceeding."

The Court disposed of the question thus (pp. 99-100):

> "Without in the least suggesting a doubt as to the efficacy, value and importance of the system of trial by jury in criminal cases as well as in civil actions, we are clearly of opinion that the Supreme Court of the District had jurisdiction and authority to determine the validity of the act which authorized the waiver of a jury and to dispose of the question as to whether the record of a conviction before a judge without a jury, where the prisoner waived trial by jury according to statute, was legitimate proof of a first offense, and this being so, we can not review the action of that Court and the Court of Appeals in this particular on habeas corpus."

This, and this only, is the decision of this Court in the Belt case; and although the case was thus disposed of upon the single ground stated, namely, that the writ

of *habeas corpus* may not be used to perform the office of a writ of error or appeal, it is interesting to note the following language of the Court in its opinion (p. 100):

> "The general rule is that the writ of habeas corpus will not issue unless the Court under whose warrant the petitioner is held is without jurisdiction, and that it can not be used to correct errors. Ordinarily the writ will not lie where there is a remedy by writ of error or appeal; *but in rare and exceptional cases it may be issued although such remedy exists.*" (Italics supplied.)

The case of Schick is this: Schick was proceeded against by information in a District Court of the United States under the Act of Congress of August 2, 1888 (24 Stat. L. 209), imposing a penalty of $50 for the knowing purchase or receipt for sale of oleomargarine not branded or stamped according to law, and waiving trial by jury he was tried by the Court and found guilty.

On writ of error this Court held that the Constitutional provision that "the trial of all crimes, except in cases of impeachment, shall be by jury" does not include such petty offenses, and there is no Congressional legislation or rule of public policy requiring a jury in such cases.

In a dissenting opinion, characteristic of its writer, Mr. Justice Harlan held that, as the offense charged was a crime against the United States and the Constitutional provision applies to *all* crimes, petty or other, Schick's conviction could not be sustained; saying (p. 100) that (1) as the offense charged was a crime against the United States, (2) as the Constitution expressly declares without qualification that the trial of

all crimes, except impeachment, shall be by a jury, (3) as Congress had not assumed to declare that the case and like ones might be tried without a jury, the parties assenting, and (4) as the trial of the case by the Court alone, without a jury, had no other sanction than the consent of the accused and the District Attorney, the judgment should be reversed.

Of this opinion the learned Judge of the Court below said (R. 62, f. 86):

> "Judge Harlan dissented very vigorously, citing the case in 170th [Thompson v. Utah, 170 U. S. 343], and the whole line of authorities read here, that a jury was not a jury if it consisted of less than twelve nor could be waived entirely. The majority of the Court cited contra the case from Massachusetts, one from Ohio and *eight or ten others which have taken the contrary view even in felony cases.* The Massachusetts case held a jury of eleven men might try if waiver was made by defendant. That case was cited with approval by a majority of the Court against the dissent of Judge Harlan, and this really unsettles my mind considerably as to what the Court would hold now in the case of express waiver." (Italics supplied.)

On this it suffices to remark, first, that on the point under consideration the majority opinion cites but seven cases in all, of which but one is mentioned as a case of felony, and secondly, that in the instant case itself this Court said that the offense charged is a felony, "and therefore, we assume, *must be tried by a jury of twelve,*" (Exp. Riddle, 255 U. S. 450); which, being the latest utterance of this Court on the subject, would seem sufficient to settle any mind "as

to what the Court would hold now in case of express waiver."

Very clearly, neither the Belt case nor the Schick case appears to have any relevancy in the premises; and, equally clearly, the learned Court erred in saying (R. 66, f. 89) that it is only an error, not a nullity, to try a case of felony by a panel of eleven jurors.

A brief notice of the seven cases cited in the Schick case as above mentioned is not without interest.

Each of Com. v. Dailey and Murphy v. Com. was a case of misdemeanor in which a jury of twelve was sworn and one withdrawn during the trial. Tyra v. Com. was a case in which the charge was of felony, but the conviction of misdemeanor. In that case also a jury of twelve was sworn and one withdrawn during the trial, the Court relying upon the preceding case of Murphy v. Com., but adding:

> "If, as contended, the record presents a case of felony and not of misdemeanor, it follows that according to section 334 of the Criminal Code the error complained of is not such as to authorize this Court to reverse the judgment of conviction, especially as no such objection was made in the Court below."

In Connolly v. State, the statute permitting trial without a jury was specifically held to be clearly in the contemplation of the State constitution.

In Peo. v. Rathbun, the defendant consented only to the substitution of the Court for triors upon challeges of jurors. And State v. Worden is particularly interesting, as witness the following from the Court's opinion (italics supplied):

"The statute * * provides that 'in all criminal causes * * the party accused may, if he shall so elect, when called upon to plead, be tried by the court instead of by the jury * *.'

"It is now claimed that that statute is in conflict with the Constitution.

"There are two clauses * * which bear upon this subject. The first is found in the 9th section * *. As this section is not much relied upon we pass to consider the 21st section, which reads, 'The right of trial by jury shall remain inviolate.'

"Compared with this language the statute would seem to be in perfect harmony with it. The *right* to a jury trial remained to the prisoner. He was not deprived of it, but voluntarily relinquished it" (pp. 363-4).

"We find in the Constitution of the United States, which was in force when our Constitution was framed, the *explicit* provision 'The trial of all crimes, except in cases of impeachment, *shall be* by jury.' It would have been easy for our convention to be equally explicit. The fact that the *interests of the public* in this regard were not expressly provided for furnishes a strong presumption that it was not intended *to place the matter beyond legislative control. With the Constitution of the United States before the convention, the omission is significant*" (p. 366).

2. The judgment under which appellant is confined is void, and not merely voidable.

Elliott v. Piersol, 1 Pet. 328;
Peo. *ex rel* Tweed v. Liscomb, 60 N. Y. 559, 568;
*Exp.* Degener, 30 Tex. App. 566, 567 and cases cited;
Harris v. Peo., 128 Ill. 585;
87 A. S. R. 173, note, and cases cited;
Scott v. State, 70 Miss. 247.

3. In every such case relief may be had by *habeas corpus*, and the court may under the writ look to the judgment under which the petitioner is detained to ascertain whether it be absolutely void for want of jurisdiction in the court that pronounced it, either because such jurisdiction was absent at the beginning or because it was lost in the course of the proceedings; and in so doing the court issuing the writ may look beyond forms and inquire into the very substance of the matter, to the extent of deciding whether the petitioner has been deprived of his liberty without due process of law, and for this purpose may inquire into jurisdictional facts, whether they appear upon the record or not.

Frank v. Mangum, 237 U. S. 309, 327, 331;
*Exp.* Wilson, 114 U. S. 417;
Neilsen, Petr., 131 U. S. 176.

4. It matters not that the petitioner may have, or have had, a remedy by appeal, or may have neglected or mistaken his remedy otherwise: in every case of unlawful detention the remedy by *habeas corpus* is of absolute right.

Peo. *ex. rel* Tweed v. Liscomb, 60 N. Y. 559;
*In re* Permstick, 3 Wash. 672, 674-5;
*Exp.* Thamm, 10 Mo. App. 595;
Com. v. Keeper of Phila. Prison, 41 Leg. Int. 94;
*In re* Jarvis, 66 Kans. 329;
*In re* Gribben, 5 Okla. 379;
*Exp.* Koerner, 176 Fed. 478;
State v. Dist. Ct., 35 Mont., 321;
*Re* Neff, 197 U. S. 488;
*Re* James Lincoln, 202 U. S. 178;
Stevens v. McClaughry, 207 Fed. 18; 125 C. C. A. 102; 51 L. R. A. (N. S.) 390.

In the case last cited the opinion is by Sanborn, Circuit Judge, and characteristically full and lucid, as witness the following therefrom:

> "And here is the true distinction between the cases in which the writ of *habeas corpus* may and those in which it may not issue. If the judgment or sentence challenged is without the jurisdiction of the court and void, the writ may issue. If it is erroneous, but within the jurisdiction of the court which rendered it, the writ may not issue. The parallel between the cases of Snow [120 U. S. 274] and Nielsen [131 U. S. 176] and the case at bar is complete, and unless the decision in the case of Spencer and others [228 U. S. 653] has overruled the cases which have just been reviewed, and departed from the fundamental principles they sustain and the practice under them which has prevailed for years in Re Mayfield, 141 U. S. 107, 116, 35 L. ed. 635, 638, 11 Sup. Ct. Rep. 939; Re Ladd (C. C.) 74 Fed. 31, 42; Re Waite (D. C.) 81 Fed. 359, 362, 372; Mackey v. Miller, 62 C. C. A. 139, 126 Fed. 161, 163; Ex Parte Peeke (D. C.) 144 Fed. 1016,—there would seem to be no doubt of the power or duty of the court to issue the writ in the case in hand. We are not persuaded that it has overruled them, departed from the rules they maintain, or decided that everyone restrained of his liberty by a void judgment which he might have challenged by a writ of error, is barred of relief by means of the writ of *habeas corpus*. It has not expressly declared that those decisions are wrong, or that the principles on which they rest are erroneous, and they are too firmly established to be overthrown by silence. On the other hand, it has carefully distinguished the leading case, the Lange Case, from those in which its opinion was delivered, and to hold that one who is being deprived of his liberty for a long term

of years by virtue of a sentence beyond the jurisdiction of the court which rendered it has deprived himself of his right to relief by writ of *habeas corpus*, because through ignorance, poverty, or neglect he failed to challenge that judgment by writ of error until it was too late, is to rob the writ of the very purpose of its existence,—the purpose to afford speedy and inexpensive relief from unlawful imprisonment to those otherwise remediless. To us it is incredible that the Supreme Court ever intended to decide, to take the striking illustrations of Mr. Justice Miller in Ex Parte Lange, 18 Wall. at page 176, 21 L. ed. 878, that one who should be sentenced by a justice of the peace having jurisdiction of fine for a misdemeanor, or by a court of general jurisdiction on an indictment for a libel, to imprisonment and death, who through ignorance or neglect should fail to appeal or procure a writ of error within the prescribed time, would be barred of relief by the writ of *habeas corpus*. It is a writ of right. The acts of Congress declare that the court to which the application for it is made 'shall forthwith award a writ of *habeas corpus*, unless it appears from the petition itself that the party is not entitled thereto,' and 'shall proceed in a summary way to determine the facts of the case, * * * and thereupon to dispose of the party as law and justice require.' Revised Statutes, Secs. 775, 761, U. S. Comp. Stat. 1901, pp. 593, 594. The petitioner is being restrained of his liberty for five years by a judgment of a Federal court which was beyond its jurisdiction and void.

"And our conclusion is that one who is being restrained of his liberty for many years by virtue of the judgment of a Federal court which is beyond its jurisdiction and void, may and should be, relieved from that restraint by the proper Federal court by means of the writ of *habeas corpus*, and

> that he is not barred from such relief by the fact that he might have obtained it by a writ of error, but failed to do so until it was too late."
>
> Stevens v. McClaughry, 207 Fed. 18, 125 C. C. A. 102; 51 L. R. A. (N. S.) 390, 397-8.

5. The learned Judge of the Court below was of opinion that appellant is precluded in the premises upon the ground that the basis of his application for discharge, namely, that he was tried by but eleven men instead of twelve, purporting to act as jurors in the case, is *res judicata*, the essential language of the Court's opinion in this regard being as follows (R. 64, f. 88):

> "One thing that I do rule is this, that really the question sought to be litigated on this *habeas corpus* has already been litigated, either before the trial Court or the reviewing Court. With a judgment rendered upon it, even though it involves the fact of jurisdiction, it becomes *res adjudicata*";

supplemented by the following, speaking of the Judge presiding at appellant's trial (R., 65, ff. 88-9):

> "in the exercise of the duty that rests on every Court to see that the record is true and if it is not true to make it true, he entertained a motion to correct his record. He had jurisdiction of that motion no matter whether he had lost it on the trial of the case when the jury was sworn or not. The case had started before him; he had tried it, unquestionably, as a Court, up to the point of swearing the jury, and there was a record necessarily to be made of what that Court was doing. It seems to me he had the right and had the duty of making a true record of that, and had jurisdic-

> tion to entertain the motion that was made before him. * * * The judgment was that that record was a correct record and needed no alteration but was as it should have been. * * * Whether right or wrong, it is settled, it is *res adjudicata* that *this record is right as respects this case.*" (Italics supplied.)

Too obviously for discussion, this involves the familiar logical fallacy *ignoratio elenchi.* The question is not what the record says but whether what it says is true, and on *habeas corpus* the latter is the crucial question. To this point the language of this Court in the case of Frank v. Mangum, *supra,* 237 U. S., 309, 331, is explicit:

> "That the due process of law guaranteed by the 14th Amendment has regard to substance of right, and not to matters of form or procedure; that it is open to the courts of the United States, upon an application for a writ of *habeas corpus,* to look beyond forms and inquire into the very substance of the matter, to the extent of deciding whether the prisoner has been deprived of his liberty without due process of law, and for this purpose to inquire into jurisdictional facts, whether they appear upon the record or not."

Very clearly, this means, if it means anything, that it makes no difference what the trial Court may have caused its record to recite as to jurisdictional facts, the Court having jurisdiction of the case on *habeas corpus* may and must in that proceeding ignore the record, no matter how made, and inquire into and ascertain the jurisdictional facts according to the truth: to hold otherwise would be to hold that, as is the plain truth in this case, by a falsification of the

record of his trial and the persistence of the trial court in maintaining that falsification, a citizen accused of crime and under imprisonment therefor may be deprived of his Constitutional right to have the legality of his imprisonment inquired into and determined according to the very truth of the matter.

Wherefore, while it may have been adjudged in this case by the trial court that the record should not be, and was not, amended, it remains as matter of truth that that record is false; and whether it be false or true is the very gist of the inquiry on *habeas corpus.*

An instructive case is that of General Investment Co. v. Lake Shore & M. S. R. Co., decided by this court at this term (No. 34), in which it was held that the overruling by a State court of a motion to set aside service of process on one of several defendants before removal of the cause to a Federal court does not preclude the latter court from examining and passing upon the question after the cause is removed into that court. True it is that in that case the State court's ruling was held to be purely interlocutory and its status in this regard not affected by the removal, and that being interlocutory the power of the State court to reconsider it passed with the cause to the Federal court; but in the instant case the power of the court below to consider the question could not arise until the case passed from the trial court, and the court below having its first opportunity to consider the case on the petition for *habeas corpus* could not then be denied its right or escape its duty to inquire into the case in accordance with the principle above stated, namely, for ascertainment of the jurisdictional facts whether appearing upon the record or not.

Counsel is not unmindful of the principle, nowhere more clearly stated than by this Court in the Frank case (p. 326), as follows:

> "Mere errors in point of law, however serious, committed by a criminal court in the exercise of its jurisdiction over a case properly subject to its cognizance, cannot be reviewed by *habeas corpus*. That writ cannot be employed as a substitute for the writ of error."

But the office of a writ of error is to remove nothing for retrial but the law, and that for the purpose of reversing or modifying the judgment to which the writ is addressed: it is quite a different thing to ask relief, *the judgment notwithstanding*. What is sought in the instant case is not to reverse the judgment complained of, but to establish *dehors* the judgment and the record on which it professes to rest, matter, not of law but of fact, showing the want of jurisdiction in the court rendering the judgment; and it is exactly that which this Court has so plainly said may always be done under the writ of *habeas corpus* as now liberalized, "in order to safeguard the liberty of all persons within the jurisdiction of the United States against infringement through any violation of the Constitution" (Frank v. Mangum, *supra*, p. 331); and as is aptly said in Peo. v. Liscomb, *supra* p. 570, "If a process good in form issued upon a judgment of a court having jurisdiction, either general or limited, must in all cases be assumed to be valid until the judgment be reversed upon error, the remedy by writ of *habeas corpus* will be of but little value."

It being therefore the function of the writ to inquire, not into the judgment, but into that on which it pur-

ports to rest, and the object of the writ to have it adjudged that *notwithstanding the judgment,* the petitioner is, by reason of the circumstances in and under which it was rendered, deprived of his liberty through a violation of the Constitution, *res judicata* cannot be predicated of the decision of the court rendering the judgment that the record on which it rests "is as it should be" and will not be amended even to accord with the facts the existence of which show the court to have been without jurisdiction in the premises: the writ of *habeas corpus* is aimed not at the judgment but at its setting, and respecting the latter, no view of another court can hamper or otherwise affect the action of the court acting under the writ.

To repeat: the statement "that really the question sought to be litigated on this *habeas corpus* has already been litigated, either before the trial Court or the reviewing Court," is palpably fallacious.

As respects this question, the only matter before the trial Court was whether the record should be amended, and the decision of that Court was that it should not be corrected because it "*is as it should be, and does not need amendment.*"

Obviously, if this be a decision at all, it is a decision that the entry "To try this cause come a jury of good and lawful men, duly impanelled, sworn and charged a true verdict to render according to the law and the evidence," is such an entry as "should be" of a verdict rendered by eleven men and accordingly "does not need amendment:" this only, and nothing more. It is not a decision that twelve men tried the cause, nor is it a decision that a trial of the cause by eleven men was legal; but assuming it to be the latter, then very plainly it is a decision in direct conflict with and

defiance of the Constitution of the United States, in which case appellant's right to release on *habeas corpus* is undeniable, unless it be that this Court is to reverse itself and hold that it is not the Constitutional right of one accused of an infamous offense to be tried by a jury of twelve men and no fewer.

And as respects the suggestion that the question under consideration was litigated before the reviewing Court—presumably the Circuit Court of Appeals—it suffices to say that by the terms of the above-quoted order of November 12, 1920, further extending the time for settling the bill of exceptions, the question was industriously prevented from reaching the reviewing Court and was as industriously excluded from the bill of exceptions, as above shown. And of course if by "reviewing Court" this, the Supreme Court of the United States, could possibly be meant, it is necessary only to remark, what the Court of itself knows, that the matter was before it on application of appellant for the writ of mandamus to correct the record—and only to correct the record—and that this Court decided only that mandamus is not the proper remedy for such purpose.

As respects the doctrine under consideration and its application, it would be difficult, if not impossible, to find a more apt expression than the following of a former distinguished member of this Court:

> "In Smith v. Auld, 1 Pac. 626, 628, 31 Kan. 262, Mr. Justice Brewer, speaking for this court, said: 'The whole philosophy of the doctrine of *res adjudicata* is summed up in the simple statement that a matter once decided, is finally decided

and all the learning that has been bestowed and all the rules that have been laid down have been for the purpose of enforcing that one proposition. One rule fully established is that you may examine the entire record of the prior action in order to determine what was in fact adjudicated. The inquiry is not limited to the mere formal judgment. It extends to the pleadings, the verdict, or the findings; and the scope and meaning of the judgment is often interpreted by pleadings, verdict, or findings. Indeed, to determine the matters which are adjudicated, not only may you look to the entire record, but also, in many instances, you may resort to parol testimony.'"

Hoisington v. Brakey, 31 Kan. 560, 3 Pac. 353, 355.

And see, to the same effect:

Steam Packet Co. v. Sickles, 24 How. 333;
Cromwell v. Sac. County, 94 U. S. 351.

It stands accordingly that the case in the particular under discussion does not present the question of *res judicata*, and that consideration thereof by the Court below was wholly irrelevant in the premises.

Respectfully submitted,

HENRY E. DAVIS,
*Attorney for Appellant.*

L. H. ELLIS,
*Of Counsel.*

# INDEX.


Page.

Statement of the case ..... 1

Argument ..... 6

I. Appellant can not attack the verity of the record collaterally in a habeas corpus proceeding by the introduction of extrinsic evidence inconsistent with it, and especially so after he has already unsuccessfully applied for a writ of mandamus to accomplish the same result, and conclusively so after he has failed to save the question properly upon error proceedings to the Circuit Court of Appeals and has totally abandoned his sole contention in his subsequent application for a writ of certiorari in this Court ..... 6

II. A trial by a jury of eleven members is a procedural defect only and is not fundamentally a total denial of a right of trial by jury ..... 15


## CITATIONS.


Cases:

*Bank of Columbia* v. *Okely*, 17 U. S. 235, 243 ..... 22

Black on Judgments, Vol. II, sec. 625 ..... 8

*Commonwealth* v. *Dailey*, 12 Cush. 80 ..... 16

*Dorr* v. *United States*, 195 U. S. 138 ..... 17

*Ex parte Parks*, 93 U. S. 18 ..... 7

*Ex parte Peterson*, 253 U. S. 300 ..... 23

*Ex parte Riddle*, 255 U. S. 450 ..... 5

*Frank* v. *Magnum*, 237 U. S. 309 ..... 4, 7, 10

*French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324 ..... 20

*Gila Valley G. & N. R.* v. *Hall*, 232 U. S. 94 ..... 2

*Grant Bros.* v. *The United States*, 232 U. S. 647, 660 ..... 2

*Hawaii* v. *Mankichi*, 190 U. S. 199 ..... 18

*Hollinger* v. *Davis*, 146 U. S. 314 ..... 22

*In re Mayfield*, 141 U. S. 107, 116 ..... 8

*Magruder* v. *Drury*, 235 U. S. 106 ..... 2

*Maxwell* v. *Dow*, 176 U. S. 581 ..... 16

*Montana Railroad Co.* v. *Warren*, 137 U. S. 348, 351 ..... 2

*Moore et al.* v. *Dempsey*, decided Feb. 19, 1923 ..... 11

Moschzisker's On Trial by Jury, page 265 ..... 20

*McCormick* v. *Sullivant*, 10 Wheat, 192 ..... 8

*Phebus* v. *Search*, 264 Fed. 407, 411 ..... 9

*Rassmussen* v. *United States*, 197 U. S. 516 ..... 17

*Thompson* v. *Utah*, 170 U. S. 343, 353 ..... 16

*United States* v. *Rathbone*, 2nd Paine 578 ..... 22

*Walker* v. *Cronkite* (C. C.), 40 Fed. 133 ..... 8

Conclusion ..... 24

# In the Supreme Court of the United States.

OCTOBER TERM, 1922.

DAVID H. RIDDLE, APPELLANT,
*v.*
JAMES E. DYCHE, WARDEN OF THE UNITED States Penitentiary at Atlanta, Georgia. } No. 663.

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.*

## BRIEF FOR THE UNITED STATES.

### STATEMENT OF THE CASE.

The appellant was tried, convicted, and sentenced in the District Court of the United States for the Eastern Division of the Northern District of Alabama for the commission of a felony (Rec. 27), the record stating that "to try this cause come a jury of good and lawful men duly impaneled, sworn and charged a true verdict to render according to the law and the evidence." (Rec. 26.) After conviction and sentence he filed a motion setting forth that as the result of an agreement between himself and the District Attorney the case was tried before a jury of eleven, and asking to

have the record amended so as to show that alleged fact. Later during the same term of court he filed another motion to set aside the judgment upon the same ground. The record recites that after hearing the evidence and argument the Court was of the opinion that the record was as it should have been, and that it did not need amendment, and denied the motion, and the subsequent motion to set aside the judgment. (Rec. 58, 59.) The record discloses exceptions to both orders (Rec. 60), *but no exception to the constitution of the jury was taken until after the verdict of guilty and the pronouncement of sentence.*

No bill of exceptions can be allowed by the court below, nor entertained by the appellate court, unless it appears from the record that an exception was taken to the ruling of the court below. *Gila Valley G. & N. R. R.* v. *Hall*, 232 U. S. 94; *Magruder* v. *Drury*, 235 U. S. 106; *Montana Railroad Company* v. *Warren*, 137 U. S. 348, 351; *Grant Brothers* v. *United States*, 232 U. S. 647, 660.

Appellant subsequently endeavored to secure a writ of mandamus from this Court to direct the trial court to amend its record so as to show that he was tried before and convicted by a jury of eleven. This Court denied the writ of mandamus (255 U. S. 450) upon the ground that appellant might have saved the point by an exception at the trial, or by a bill of exceptions to the denial of his subsequent motion to set aside the judgment, setting forth whatever facts or offers of proof as were material, and then have brought a writ of error; and, because as a

statutory method by writ of error was provided for reviewing the judgment, mandamus could not be used for reviewing the action below or to reverse a decision of record.

Appellant having failed to secure a writ of mandamus from this Court (directing the trial court to amend its record so as to show that the case was tried before a jury of eleven), sued out a writ of error to the Circuit Court of Appeals with a bill of exceptions *not* containing his objection that he was tried and convicted before and by a jury of eleven, and this even though he might have saved the point, as Mr. Justice Holmes said in the mandamus case, "by an exception at the trial or by a bill of exceptions to the denial of his subsequent motion, setting forth whatever facts or offers of proof as were material, and then have brought a writ of error." The Circuit Court of Appeals affirmed the judgment of the lower Court. (279 Fed. 216.)

In explanation of the reason why the appellant herein did not carry his point to the Circuit Court of Appeals on a writ of error, counsel for appellant, in the brief filed in the mandamus case, No. 27 Original, in this court, states, page 31, "No separate writ of error could have been sued out by petitioner on the judgment of the District Court to amend the record in the case. The writ of error would necessarily have to be sued out and take up the entire case. It is manifest that petitioner will get no relief from a writ of error on the judgment denying the motion to amend the judgment without having the original

judgment of conviction reversed, and the Appellate Court, considering the whole case, would have no way of knowing that there was only eleven men on the jury unless the District Judge is required to state that there were only eleven men on the jury; and if he does state that fact, as he should state it, the motion to amend the judgment and proceedings thereon would be immaterial." We do not follow this line of reasoning.

Furthermore, counsel for appellant, on page 63 of another brief in the mandamus case states: "This court, when it 'analyzes the facts,' will determine that the ruling of Judge Grubb denying the petition *was purely a decision of a question of law.*" In the brief in the present case counsel for appellant states: "Counsel is not unmindful of the principle, nowhere more clearly stated than by this court in the Frank case, as follows (237 U. S. 309, 326):

> Mere errors of law, however serious, committed by a criminal court in the exercise of its jurisdiction over a case properly subject to its cognizance, cannot be reviewed by habeas corpus. That writ cannot be employed as a substitute for the writ of error.

Counsel for appellant, having previously admitted that Judge Grubb's ruling denying the petition "was purely a decision of a question of law," now states that mere errors of law, "however serious, can not be reviewed by habeas corpus." Evidently the present counsel for appellant does not concur in the views expressed by his previous counsel.

Appellant then applied to this Court for a writ of certiorari, which was denied. (259 U. S. —.) In appellant's brief in support of his petition for a writ of certiorari, at page thirty, his counsel states:

> In conclusion, counsel does not feel justified in directing attention to petitioner's assignments numbered 113 and 114 (R. 816, 819) dealing with the constitution of the jury empaneled and sitting in the case.

The subject of this assignment was before this Court in the case entitled Ex parte Riddle, 255 U. S. 450, in which the circumstances of the empaneling and constitution of the jury are fully set forth, and in which the Court felt constrained to deny the writ of mandamus prayed, closing its opinion in the following words:

> In this case the facts were more or less clearly admitted in argument, but the record does not establish them, and the extent of the agreement or dispute with regard to them does not change the remedy to be sought.

As the appellant has thus admitted that the circumstances of the impaneling and the constitution of the jury were "fully set forth" in the previous mandamus case in which the court denied the writ because the "record" did not establish them, it is difficult to reconcile this former mental attitude with his present attempt to attack *collaterally* the verity of the trial record in a habeas corpus proceeding. Parol evidence can not be used to vary the record with any more success in habeas corpus than in mandamus.

On July 7, 1922, appellant sued out a writ of habeas corpus in the United States District Court for the Northern District of Georgia, which discharged the rule and remanded the petitioner to the custody of the Marshal. From that judgment the case is now again here on appeal.

ARGUMENT.

I.

*Appellant can not attack the verity of the record collaterally in a habeas corpus proceeding by the introduction of extrinsic evidence inconsistent with it; and especially so after he has already unsuccessfully applied for a writ of mandamus to accomplish the same result; and, conclusively so, after he has failed to save the question properly upon error proceedings to the Circuit Court of Appeals, and has totally abandoned his sole contention in his subsequent application for a writ of certiorari in this Court.*

This is an attempt to attack the verity of the record in a cause wherein a final judgment of a court of competent jurisdiction has been rendered; such a judgment, valid on its face, is an unanswerable return to a writ of habeas corpus. The jurisdiction of the Court to try the appellant is not disputed and the error sought to be corrected collaterally on a petition for habeas corpus is *procedural*.

If any such irregular action has occurred, as appellant complains, he has had his remedy by mandamus, by error, and by certiorari. And although, possibly, on a review in a proper proceeding by an appellate court, the objections presented might

be amply sufficient to procure a reversal of the judgment, yet appellant can not make the proceeding by habeas corpus a short cut to the same result, and now substitute it for the writ of error which he mistakenly abandoned. Advantage can not be taken in this manner of the alleged defect in the proceeding, even though it might be sufficient to cause the reversal of the judgment on writ of error. Any errors alleged to have been committed in the trial court's determination of the motion to set aside the judgment do not constitute jurisdictional defects. On habeas corpus there can be no inquiry into an alleged defective or irregular selection of a jury; conclusively so, when the record is regular upon its face, and no proper exception has ever been taken to attack its verity. His guilt is now *res adjudicata*, the exact question having been litigated by him unsuccessfully in the original case, and the ruling upon it having never been properly appealed from, and the stability of such adjudication can not be affected by possible errors in procedure. Ex parte Parks, 93 U. S. 18, 23, wherein Mr. Justice Bradley, delivering the opinion of the Court, said: "If the court had jurisdiction and power to convict and sentence, the writ can not issue to correct a mere error." *Frank* v. *Magnum*, 237 U. S. 309, 334. If error were committed it is obliterated by a final judgment after the defendant has had his day in court.

It is a principle of law long since firmly established that the judgment of a court of competent jurisdiction so long as it stands in full force and unreversed can not be impeached in a collateral proceeding in habeas corpus aimed at attacking the verity of the record. If the record shows the facts necessary to confer jurisdiction, its averments are final and conclusive in every collateral proceeding and can not be contradicted by any extraneous evidence. Black, in his work on Judgments, Vol. 2, Sec. 625, clearly states the rule:

> * * * The averments or disclosures of the record, in respect to the matters decided, cannot be contradicted by any extraneous evidence. They may be explained, when ambiguous. They may be made specific when generally expressed. But they can not be contradicted. (Citing numerous authorities.)

This record states that "to try this cause come a jury of true and lawful men duly impaneled, sworn, and charged a true verdict to render according to the law and the evidence." Any attempt now to attack the verity of this record, regular upon its face, by a collateral proceeding in habeas corpus must necessarily prove futile. *McCormick* v. *Sullivant*, 10 Wheat. 192; *Walker* v. *Cronkite* (C. C.), 40 Fed. 133, and a "multitude of cases." (See following quotation.) In the leading case of *In re Mayfield*, 141 U. S. 107, 116, Mr. Justice Brown, in delivering the opinion of this court, used the following apposite language:

> The point is taken in the brief submitted by the Attorney General that the Supreme Court

has no power to consider this question upon an application for a writ of habeas corpus. This court has held, however, in a multitude of cases, that it had power to inquire with regard to the jurisdiction of the inferior court, either in respect to the subject matter or to the person, even if such inquiry involved an examination of facts outside of, *but not inconsistent with*, the record. Ex parte Yerger, 8 Wall. 85; Ex parte Virginia, 100 U. S. 339; Ex parte Carll, 106 U. S. 521; Ex parte Yarbrough, 110 U. S. 651; Ex parte Bigelow, 113 U. S. 328; Re Nielson, 131 U. S. 176; Re Savin, 131 U. S. 267. In re Cuddy, 131 U. S. 280, it was held directly that where the petitioner had been committed for a contempt he was at liberty, upon application for a writ of habeas corpus, to allege and prove facts *not contradictory* to the record, which went to show that the court was without jurisdiction.

In *Phebus* v. *Search*, 264 Fed. 407, 411, Judge Sanborn, delivering the opinion of the Circuit Court of Appeals, said:

> * * * judgments of courts empowered to hear and determine issues relative to the subject matters and persons to the suits affected by their respective decisions, although such judgments may be illegal and wrong, are simply voidable and are not open to collateral attack. *Foltz* v. *St. Louis & S. F. Ry. Co.*, 60 Fed. 316, 318, 319, 8 C. C. A. 635, 637, 638; *Deming* v. *McClaughry*, 113 Fed. 639, 650; 51 C. C. A. 349, 360; *King* v. *McAndrews*, 111 Fed. 860, 863; 50 C. C. A. 29, 32.

Further authorities establishing this point are too numerous to mention.

In *Frank* v. *Magnum*, 237 U. S. 309, 331, much relied upon by appellant, this court held that a prisoner in custody pursuant to the final judgment of a state court of criminal jurisdiction may have a judicial inquiry in a court of the United States into the very truth and substance of the causes of his detention, and even though it may become necessary to look behind and beyond the record of his conviction to a sufficient extent to test the jurisdiction of the State court to proceed to judgment against him.

In the present case appellant has already attempted to test the jurisdiction of the trial court by offering the same line of proof in his mandamus application as he now offers in habeas corpus, and this court denied the writ because appellant might have saved the point by an exception of the trial, or by a bill of exceptions to the denial of his subsequent motion to set aside the judgment, setting forth facts or offers of proof as were material, and then have brought a writ of error. This being the situation, when the identically same *point* is before this court again, this time in habeas corpus instead of mandamus, there is now less justification "to look behind and beyond the record of his conviction."

The holding in the *Frank case* that a prisoner may have a judicial inquiry looking "behind and beyond the record of his conviction" evidently did not mean that the prisoner could attack the verity of the record by offering proof of facts

not only outside of, but also inconsistent with and contradictory to the record. That this is so, is shown by the fact that the cases of *In re Mayfield, supra,* and *Cuddy, Petitioner, supra,* are cited. The former case holds that the judicial inquiry can not involve an examination of facts "inconsistent with the record"; the latter case holds that the petitioner can not allege or prove facts "contradictory to the record."

In the very recent case of *Moore, et al.,* v. *Dempsey, Keeper of the Arkansas State Penitentiary,* decided February 19, 1923, a writ of habeas corpus was applied for upon the ground that the proceedings in the State Court, although a trial in form, were only a form, and that the appellants were hurried to conviction under the pressure of a mob without any regard for their rights and without, according to them, due process of law. This was not a question of procedure. If true, it was an absolute denial of any trial whatever.

The petition was dismissed upon demurrer, and the statement of this court was confined to the facts admitted by the demurrer. The case was remanded to the District Court for a rehearing in order that the District Judge might examine the facts for himself, "when," as Mr. Justice Holmes stated, "if true as alleged they make the trial absolutely void." He concludes his opinion: "We have confined the statement to facts admitted by the demurrer. We will not say that they can not be met, but it appears to us unavoidable that the District Judge should find

whether the facts alleged are true and whether they can be explained so far as to leave the state proceedings undisturbed."

The situation in the present case is very different. Herein the trial judge heard the motion to amend the record so as to show that the jury was composed of eleven men only, and the appellant produced and offered testimony by witnesses in his effort to establish the truth of his contention; and after a full hearing, the court denied the motion. (Rec. 33, 34.) Subsequently appellant presented a motion to set aside the judgment upon the several grounds "(1) that the judgment entry therein was and is false; (2) that no jury was empanelled in said cause; (3) that the pretended verdict on which such judgment was based was rendered by eleven men and not twelve, and was and is therefore void and of no effect; (4) that the said pretended jury which rendered said pretended verdict on which the said pretended judgment was based was composed of eleven men and no more; (5) that the recital aforesaid that to try the said cause had come a jury of good and lawful men was and is false and deprived petitioner of his constitutional right to a trial by jury, etc." After hearing and argument the trial judge denied it.

In the *Moore case* the District Judge dismissed the petition on demurrer, and held that if the petitioner had open to him an adequate correctional method for reviewing the action of the trial court, he could not have resorted to habeas corpus. In the instant

case appellant has had open to him an adequate correctional method for review, but has abandoned it by not properly saving his question in error proceedings. The essential differences between the *Moore case* and the instant case may be summarized as follows:

1. In the *Moore case*, the District Judge held that the petition showing a complete denial of any trial in due course was insufficient, and refused to issue the writ. The Supreme Court held that he was in error, and should have issued the writ and heard the case. In the instant case, the District Judge issued the writ and discharged it after a hearing.

2. In the *Moore case*, the matter relied upon by the petitioner to avoid the conviction was matter that could form no part of the record of conviction and was inherently extraneous. It was the domination of the trial tribunal by a mob. It virtually meant a dissolution of the Court. In the *Riddle case*, the record recited a trial in due course, and the contrary could be shown only by oral and extraneous evidence directly contradicting the record.

3. In the *Moore case* the conviction was had in a State Court, and the appeal was to a State Court. In the *Riddle case*, appeal might have been had to the Supreme Court of the United States. In the *Moore case* the Supreme Court reiterated the doctrine of the *Frank case* (*Frank* v. *Mangum*, 237 U. S. 309), that if the petitioner had had open to him an adequate correctional method for reviewing the action of the trial court, he could not have resorted to habeas corpus.

In the *Frank case* the Supreme Court held that the Georgia law afforded such a correctional method, and the writ was disallowed. The adequacy of Riddle's remedy, without resort to habeas corpus, aligns this case with the *Frank case*, and differentiates it from the *Moore case*.

4. The legality of Riddle's conviction is *res adjudicata*, the exact question having been litigated by him unsuccessfully in the original case, and was neither appealed from or reversed. In the *Frank case* former Chief Justice White said (237 U. S. 309–333):

> Whatever question is raised about the jurisdiction of the trial court, no doubt is suggested but that the Supreme Court (of Georgia) had full jurisdiction to determine the matters of fact and questions of law arising out of the alleged disorder; nor is there any reason to suppose that it did not fairly and justly perform its duty. It is not easy to see why appellant, is not upon general principles, bound by its decision. It is a fundamental principle of jurisprudence, arising from the very nature of courts of justice and the objects for which they are established, that a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction can not afterwards be disputed between the same parties. *Sou. Pac. R. R. Co.* v. *U. S.*, 168 U. S. 1, 48. The principle is as applicable to the decisions of criminal courts as to those of civil jurisdiction. As to its application, in habeas corpus cases, with respect to decisions by such courts of the facts pertaining to the

jurisdiction over the prisoner, see Ex parte Terry, 128 U. S. 289, 305, 310, Ex parte Columbia George, 144 Fed. Rep. 985, 986.

Apart from these distinctions, the *Moore case* was in its very nature extraordinary and so abnormal that its doctrine should be restricted to its own peculiar facts. A destruction of the independence and freedom of a Court by mob violence presents an extraordinary situation, to which decisions as to other Courts, whose competency and freedom to act are not in question, are inapplicable. The *Moore case* was, we submit, not intended to destroy all orderly procedure by holding that after a convicted defendant has exhausted all his rights by resort to appellate courts, he can begin all over again in a habeas corpus proceeding by asking one District Judge to sit in judgment on appellate tribunals.

## II.

*A trial by a jury of eleven members with the defendant's assent is a procedural defect only and is not fundamentally a denial of a right of trial by jury.*

With no abandonment whatsoever of the contention that the appellant may not successfully attack the verity of the record collaterally in this habeas corpus proceeding; and, that, therefore, the question of the constitutionality of his trial before an alleged jury of eleven is not herein properly presented, we desire to briefly consider the subject of a trial by jury.

This court decided in *Maxwell* v. *Dow*, 176 U. S. 581, that the trial of a person in a state court for a felony before a jury of eight was constitutional, the state statufe providing a trial by that number except in capital cases, *holding* that this is a question properly to be determined by the citizens of each state for themselves, and that the privileges and immunities of citizens of the United States do not necessarily include all the rights protected by the first eight amendments to the Federal Constitution against the powers of the Federal Government, and that the conviction by a jury of eight did not abridge the convict's privilege and immunities under the Constitution as a citizen of the United States, and did not deprive him of his liberty without due process of law.

It is, however, true that in *Thompson* v. *Utah*, 170 U. S. 343, 353, this court held that under the laws of the Territory of Utah it was not within the power of one accused of a felony, by consent expressly given or by his silence, to authorize a jury of only eight persons to pass upon the question of his guilt; and that the law in force when his crime was committed did not permit any tribunal to deprive him of his liberty, except one constituted of a court, and jury of twelve persons.

In *Commonwealth* v. *Dailey*, 12 Cush. 80, the defendant in a misdemeanor case waived his right to a full panel and consented to be tried by eleven jurors, and this action was sustained by the Supreme Court

of Massachusetts. Chief Justice Shaw, delivering the opinion of the court, said:

> He may waive any matter of form or substance, excepting only what may relate to the jurisdiction of the court.

In *Rassmussen* v. *United States*, 197 U. S. 516, this court held that by virtue of the Fifth and Sixth Amendments to the Constitution it was beyond the power of Congress to deprive one accused in Alaska of a misdemeanor of trial by a common law jury, and that Section 171 of the Alaska Code, 31 Stat. 358, in so far as it provided that in trials for misdemeanors six persons shall constitute a legal jury, was unconstitutional and void, because Alaska had been incorporated into the United States and the Constitution was applicable to that territory. The court in its opinion stated (p. 526):

> Without attempting to examine in detail the opinions in the various cases, in our judgment it clearly results from them that they substantially rested upon the proposition that where territory was a part of the United States the inhabitants thereof were entitled to the guaranties of the Fifth, Sixth, and Seventh Amendments, and that the act or acts of Congress purporting to extend the Constitution were considered as declaratory merely of a result which existed independently by the inherent operation of the Constitution.

In *Dorr* v. *United States*, 195 U. S. 138, this court held that as Congress did not extend the right of a trial by jury to the Philippine Islands, and had not

incorporated them into the United States as to make the provision apply by implication, the right to a trial of jury did not exist, and the *ratio decidendi* of this decision was that a jury trial was procedural and not a fundamental liberty.

In *Hawaii* v. *Mankichi*, 190 U. S. 197, 199, the accused was convicted of manslaughter, in alleged violation of the Constitution, in that he was tried upon an indictment not found by a grand jury, and convicted by the verdict of nine out of twelve jurors, following the usual course of procedure in the Republic of Hawaii, prior to its incorporation as a territory of the United States, but subsequent to the Resolution of July 7, 1898, annexing Hawaii. That Resolution provided that the municipal legislation of Hawaii *not inconsistent with the Constitution of the United States* should remain in force until Congress otherwise determined.

Mr. Justice Brown, delivering the opinion of the court, affirming the judgment of conviction, stated:

> But we place our decision of this case upon the ground that the two rights alleged to be violated in this case are not fundamental in their nature, but concern merely a method of procedure, etc.

The two rights referred to were a trial based upon an indictment found by a grand jury, and a trial before a common-law jury of twelve.

From a consideration of these leading cases upon the subject of the right of a trial by jury it appears that a citizen of the United States may be convicted of a felony in a state court of Utah by a jury

of eight (*Maxwell* v. *Dow*, *supra*), but that he could not be convicted of even a misdemeanor in Alaska except by a jury of twelve. (*Rassmussen* v. *United States*.) The American citizen in the Philippines is entitled to no jury trial at all. (*Dorr* v. *United States*, *supra*.) When Utah was a Territory the citizen could be convicted of a felony only by a jury of twelve, but since it has become a State he may be convicted of a felony by a jury of only eight. The same citizen who could not lawfully be convicted of even a misdemeanor in Alaska except by a jury of twelve may be convicted upon information in Illinois of a misdemeanor without any jury trial at all, having waived the same and consented to trial by the court. (*Schick* v. *United States*, *supra*.)

However, the question in the instant case is not whether a jury must consist of twelve, but whether a defendant may waive the right to a verdict of twelve jurors and accept a verdict of eleven jurors.

The petit jury originated as an alternative for the trial by ordeal. Towards the end of the twelfth century the criminal petit jury was established on a definite basis, but the right to trial by jury in criminal cases was apparently a matter of privilege for a time, to be purchased for a consideration; by the end of the thirteenth century, trial by jury in criminal cases had become well established as a matter of right. Refusal of a defendant to submit to a jury trial was at one time treated somewhat like a confession of guilt. To-day, when the accused pleads guilty, he thus waives his right to a trial by a jury, whether it be

composed of twelve, or less than twelve jurors. An innocent man may plead guilty to shield the actual culprit, as public policy does not demand that a jury alone must pass on his guilt or innocence.

While Magna Charta provided that no man shall be deprived of his life, liberty or property unless "by the lawful judgment of his peers and by the law of the land," and this has been popularly but erroneously accepted as a guaranty of a trial by jury, yet "such trials, in their present form, did not come into existence until some time later, and the phrase 'lawful judgment of his peers and the law of the land'—meant nothing more than a guaranty of the right to trial by one of the then existing modes—or, as Bigelow says, by 'duel, ordeal or compurgation in criminal cases.'" (Moschzisker's on Trial by Jury, page 265.)

There is no special magic in a trial by a jury composed of twelve persons. A jury at different times and in different countries has had different numbers. (See text book last hereinbefore cited.) Under the Constitution any recognized proceeding of the common law meets the requirements of due process, and in the absence of a constitutional provision to the contrary a state law may provide for the trial of persons for crimes, infamous or otherwise, either without a jury at all or before a jury composed of less than twelve. *French* v. *Barber Asphalt Paving Company*, 181 U. S. 324.

As previously quoted, in *Hawaii* v. *Mankichi*, *supra*, Mr. Justice Brown, delivering the opinion of this

court, stated that the right to be tried before a common law jury of twelve was not "fundamental in its nature."

In *Schick* v. *United States*, *supra*, Mr. Justice Brewer, delivering the opinion of the court, declared that the right of a trial by jury, given the accused by the Sixth Amendment, was one that could in some instances be waived.

He said:

> But if there be no constitutional or statutory provision or public policy requiring a jury in the trial of petty offenses, upon what ground can it be contended that a defendant therein may not voluntarily waive a jury? Can it be said that a defendant can plead guilty of the most serious, even a capital, offense, and thus dispense with all inquiry by a jury, and can not when informed against for a petty offense waive a trial by jury?
>
> Article Six of the amendments, as we have seen, gives the accused a right to a trial by jury. But the same article gives him the further right "to be confronted with the witnesses against him. * * * and to have the assistance of counsel." Is it possible that an accused can not admit and be bound by the admission that a witness not present would testify to certain facts? Can it be that if he does not wish the assistance of counsel and waives it, the trial is invalid? It seems only necessary to ask these questions to answer them. When there is no constitutional or statutory mandate, and no

> public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy.

There is no constitutional nor statutory mandate requiring that one accused of a felony in a Federal Court *must* be tried before a jury of twelve. There is no public policy requiring it; for, if there were, that same public policy would prohibit the trial of an accused for a felony in a *State* court before a jury of six, or with no jury at all, if the State statutes so provided. *Hollinger* v. *Davis*, 146 U. S. 314.

If public policy requires that a man must be tried by a jury of twelve, even if willing to be tried by eleven, why does it permit men charged with felonies to waive a trial altogether by a plea of guilty?

In *United States* v. *Rathbone*, 2 Paine 578, it was determined that the right to trial by jury was for the *benefit* of parties litigating in courts of justice, and might accordingly be waived. In *Bank of Columbia* v. *Okely*, 17 U. S. 235, 243, Mr. Justice Johnson, delivering the opinion of the court, said:

> And if the defendant does not avail himself of the right given him, of having an issue made up, and the trial by jury, which is tendered to him by the act, it is presumable, that he can not dispute the justice of the claim. That this view of the subject is giving full effect to the seventh amendment of the Constitution, is not only deducible from the general intent, but from the express wording of the article referred to. Had the terms

been that "the trial by jury *shall* be preserved," it might have been contended that they were imperative, and could not be dispensed with. But the words are, that the *right* of trial by jury shall be preserved, which places it on the footing of a *lex pro se introducta*, and the benefit of it may therefore be relinquished. As to the words from Magna Charta, incorporated into the constitution of Maryland * * * they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by established principles of private rights and distributive justice. With this explanation, there is nothing left to this individual to complain of. What he has lost he has voluntarily relinquished, and the trial by jury is open to him, either to arrest the progress of the law, in the first instance, or to obtain redress for oppression, if the power of the bank has been abused.

In the recent case of *Ex parte Peterson*, 253 U. S. 300, Mr. Justice Brandeis, in a most interesting opinion, said:

> New devices may be used to adapt the ancient institution [of trial by jury] to present needs and to make of it an efficient instrument in the administration of justice. Indeed, such changes are essential to the preservation of the right. The limitation imposed by the Amendment is merely that *enjoyment* of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with.

Appellant has been found guilty under three counts of using the United States mails in furtherance of a scheme to defraud. If, with his consent, he has been tried and convicted by a jury of *eleven* jurors of the vicinage, still he has been afforded all the essential benefits of trial by jury. He has been denied no fundamental rights of American citizenship, because a citizen of any of our States, enjoying equally the privilege of American citizenship, may be convicted in a State court of any crime by a jury of any number, or with no jury trial at all, if the State law so provides. And he has been denied no rights, fundamental or otherwise, which he can not consent to waive, because, as stated by Mr. Justice Brewer in the *Schick case, supra:*

> When there is no constitutional or statutory mandate, and no public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy.

## CONCLUSION.

Unless this court concludes that appellant may successfully attack the verity of the record collaterally in this habeas corpus proceeding, the question of the constitutionality of his trial before an alleged jury of eleven is not here presented to it for its decision. Basing our argument upon the contention that such a collateral attack can not be here sustained, we therefore urge that the constitutional question is not now properly presented to this Court. As Mr. Justice Holmes stated in delivering the opinion of this Court when the case was here on man-

damus, "In this case the facts were more or less clearly admitted at the argument *but the record does not establish them* and the extent of agreement or dispute with regard to them does not change the remedy to be sought."

If, however, defendant can now raise the question in this proceeding, then we earnestly submit that he has had the trial by jury in the form which he desired and that the jury, thus accepted by him and to which he submitted the issue, has found him guilty and that he should not now destroy that verdict by adding to his crime a gross breach of faith to the Court and jury which tried him, a breach of faith the more reprehensible because he was a member of the bar and in a special sense owed the Court loyalty in word and deed.

Solicitude for the rights of defendant in criminal cases is entirely proper, but there must be a limit to the rights of a defendant to juggle with the processes of law to save himself from the consequences of his crime.

JAMES M. BECK,
*Solicitor General.*
RUFUS S. DAY,
*Special Assistant to the Attorney General.*

APRIL, 1923.

*Reversed.*

---

## RIDDLE *v.* DYCHE, WARDEN OF THE UNITED STATES PENITENTIARY AT ATLANTA, GEORGIA.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

No. 663. Argued April 12, 1923.—Decided May 21, 1923.

1. The objection that a trial and conviction in the District Court were illegal because the jury was made of but eleven men is one that should be taken by a writ of error, based on proper exceptions. P. 334.
2. A person tried, convicted and sentenced upon a record showing that a lawful jury was empaneled, sworn and charged, cannot collaterally impeach the record by a proceeding in *habeas corpus* based on the proposition that there were only eleven jurors. P. 335. Cf. *Ex parte Riddle*, 255 U. S. 450.
3. Proceedings of a District Court within its jurisdiction cannot be impeached and reëxamined collaterally by a District Court of another district. P. 336.

Affirmed.

APPEAL from an order of the District Court discharging a writ of *habeas corpus* and remanding the appellant to custody.

*Mr. Henry E. Davis*, with whom *Mr. L. H. Ellis* was on the brief, for appellant.

*Mr. Rufus S. Day*, Special Assistant to the Attorney General, with whom *Mr. Solicitor General Beck* was on the brief, for appellee.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

The appellant was convicted in the Federal District Court for the Northern District of Alabama of a felony and sentenced to imprisonment. The record of the District Court recites that "a jury of good and lawful men" was duly empaneled, sworn and charged. After sentence appellant moved to amend the record entry to show that only eleven men sat as jurors in the case and offered testimony in support of the motion. The court rejected the proof on the ground that oral testimony was not admissible to modify or amend the record and, first reciting that after hearing the evidence and arguments and being of opinion that the record of the judgment entry was as it should be and did not need amendment, denied the motion. Appellant then applied to this Court for a writ of mandamus to require the district judge to correct the record in the particulars just stated, setting forth in his petition the evidence offered and rejected. The writ was denied, *Ex parte Riddle*, 255 U. S. 450, this Court saying (p. 451):

"He [appellant] might have saved the point by an exception at the trial or by a bill of exceptions to the denial of his subsequent motion, setting forth whatever facts or offers of proof were material, and then have brought a

writ of error. *Nalle* v. *Oyster,* 230 U. S. 165, 177. In such cases mandamus does not lie. Ordinarily, at least, it is not to be used when another statutory method has been provided for reviewing the action below, or to reverse a decision of record. *Ex parte Morgan,* 114 U. S. 174; *Ex parte Park Square Automobile Station,* 244 U. S. 412, 414. In this case the facts were more or less clearly admitted at the argument but the record does not establish them and the extent of agreement or dispute with regard to them does not change the remedy to be sought." Appellant then took the case by writ of error to the Circuit Court of Appeals for the Fifth Circuit, *Riddle* v. *United States,* 279 Fed. 216, where the judgment so far as it concerns appellant was affirmed.

The point was not saved in a bill of exceptions, and it was not considered by the Court of Appeals. After the rendition of the judgment by that court, appellant sued out a writ of *habeas corpus* in the District Court for the Northern Division of the Northern District of Georgia, seeking release from imprisonment on the ground that the jury which convicted him was illegally constituted of less than twelve men. That court, on the return of the appellee and after hearing, discharged the writ and remanded appellant to custody, from which order the case comes here by appeal.

That the trial court had jurisdiction to try and punish the appellant for the offense with which he was charged is not disputed. The attempt is collaterally to impeach the record, showing upon its face that a lawful jury was duly empaneled, sworn and charged. Appellant's remedy, as suggested in the mandamus proceeding, was by writ of error. He did not avail himself of it and whatever may have been the cause or excuse for not doing so, *habeas corpus* cannot be used as a substitute. *Frank* v. *Mangum,* 237 U. S. 309, 326, and cases cited; *In re Lennon,* 166 U. S. 548, 552; *In re Coy,* 127 U. S. 731, 758–759. The

writ of *habeas corpus* is not a proceeding in the original criminal prosecution but an independent civil suit, *Ex parte Tom Tong*, 108 U. S. 556, 559, in which the record of the trial court is not open to collateral attack but imports absolute verity. See *Ex parte Tobias Watkins*, 3 Pet. 193, 202–203, 207; *In re Lennon, supra*, p. 553; *Grignon's Lessee* v. *Astor*, 2 How. 319, 340–342; *Matter of Gregory*, 219 U. S. 210, 213–214, 218; 2 Black on Judgments, § 625; 1 *Id.* § 254.

The power to inquire into facts outside the record, allowed under some circumstances, *In re Mayfield*, 141 U. S. 107, 116, cannot be extended to such as are inconsistent with the record.

The *Frank Case*, relied upon by appellant, does not decide otherwise. The language quoted (237 U. S. 331) to the effect that the court may "look behind and beyond the record . . . to a sufficient extent to test the jurisdiction of the . . . court" and "inquire into jurisdictional facts, whether they appear upon the record or not" was not meant to abrogate the rule established by prior decisions that the record may not be contradicted collaterally at least, where, as here, jurisdiction of the cause or parties is not involved; and this is demonstrated by the cases cited in support of the statement. In *Cuddy, Petitioner*, 131 U. S. 280, 286, the Court, sustaining the propriety of the inquiry there permitted, said: "Such evidence would not have contradicted the record." In the *Mayfield Case, supra*, it was said that the inquiry might involve "an examination of facts outside of, but not inconsistent with, the record." 141 U. S. 116. Nor is there anything to the contrary in the other two cases cited.

The court below was right in ruling that it was without authority to review or set aside the action of the trial court, for, as this Court said in *Sargeant* v. *State Bank of Indiana*, 12 How. 371, 385: ". . . whatever may be

the powers of a superior court, in the exercise of regular appellate jurisdiction, to examine the acts of an inferior court, the proceedings of a court of general and competent jurisdiction cannot be properly impeached and re-examined collaterally by a distinct tribunal, one not acting in the exercise of appellate power."

The order of the District Court denying the writ is

*Affirmed.*